Supreme Court, U.S.
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No. 961128 NOV 13 1996

In The Supreme Court of the United States

October Term, 1996

ALLIANCE AGAINST IFQS; LADY BLACKIE, INC.; MAKO HAGGERTY; MATHEW DONOHOE; NANCY L. LANDE; ADRIAN LECORNU; HOWARD CARLOUGH; JERE MURRAY; PAUL K. SEATON; WILLIAM SULLIVAN; DON HALL;

Petitioner,

vs.

RONALD H. BROWN, Secretary of Commerce; CLARENCE B. PAUTZKE, Executive Director North Pacific Fisheries Management Council; WESTERN ALASKA FISHERIES DEVELOPMENT ASSOCIATION;

Respondents.

and

PETER M. KNUTSEN; EDWIN FUGLVOG; ROBERT J. WURM; ANDREW SCALZI; NANCY PHILLIPS, et. al.;

Intervenors - Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether, By the Court's Giving So Much Deference to the Secretary's Promulgation of a Regulation that the Regulation Violated a Statutory Directive, Petitioners were Denied Procedural Due Process.

B. Whether Petitioners Were Also Denied Procedural Due Process Because The Level of Deference Shown to the Secretary's Action Shielded from Judicial Review Serious Conflicts of Interest on the Fisheries Council which Proposed the Regulation.

C. Whether the Regulation is also Rendered Invalid Because Several Statutory Directives were Violated.

LIST OF ALL PARTIES TO THE PROCEEDING, PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

The caption of the case contains the names of all the parties.

The only Plaintiffs-Petitioners which are not individuals, Alliance Against IFQs and Lady Blackie, Inc., have no parent companies and no nonwholly owned subsidiaries.

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---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Alliance Against IFQs, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 84 F.3d 343 and is reproduced in the Appendix filed herewith ("App.") at 1a. The unreported opinions of the district court in this case are reproduced at Appendices B, C, and D. The transcript of oral argument before the District Court on December 19, 1994 is included as Appendix N.

STATEMENT OF JURISDICTION

On May 22, 1996, a panel of the United States Court of Appeals for the Ninth Circuit issued an opinion and order affirming the judgment of the United States District Court for the District of Alaska which granted summary judgment to Defendants and dismissed Petitioners' complaint. Petitioners timely filed a Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc. On August 15, 1996, the Ninth Circuit denied Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

United States Constitution, Amendment V

United States Constitution, Amendment XIV, § 1

16 U.S.C. § 773c(c)
16 U.S.C. § 1851(a)(4)(A)
16 U.S.C. § 1853(d)(1)(A)(f)(2)
16 U.S.C. § 1855(b)(1)
28 U.S.C. § 1254
29 U.S.C. § 1291

58 Federal Register 59,375 (50 C.F.R. § 676)

The full text of these provisions are set out in the Appendix.

STATEMENT OF THE CASE

"This is a troubling case[,]" as the Ninth Circuit candidly acknowledged. Alliance Against IFQs v. Brown, 84 F.3d 343, 352 (9th Cir. 1996). The Individual Fishing Quota (IFQ) program for Pacific halibut and sablefish gave fishing privileges worth more than $100 million to 88 individuals and corporations -- vessel owners and lessees, all -- and none at all to those who fish for their

livelihood -- the fishermen themselves. As the Ninth Circuit noted, "[p]erfectly innocent people going about their legitimate business in a productive industry have suffered great economic harm because the federal regulatory scheme changed." Id., 84 F.3d at 352.

Because the IFQ program allocates fishing privileges only to owners and lessees, and not to crew and others who actually fish, the Ninth Circuit also concluded that the program "violates the statutory command of fairness and equity to 'all' the fishermen." Id. at 348; see 16 U.S.C. § 1851(a)(4)(A) and 16 U.S.C. § 773c(c). In spite of the plan's violating both the spirit and the express language of this "statutory command," the Ninth Circuit nevertheless concluded that the Secretary did not abuse his discretion in approving the program.[1/] Id. at 352.

In reaching this conclusion, the Ninth Circuit, like the District Court before it, gave such enormous deference to the Secretary's regulation that it

---

[1/] The Secretary of Commerce has no authority either to develop a limited access plan or to modify one submitted for review. See discussion infra p. 12, text accompanying n.3 and n.3.

effectively nullified Petitioners' right to seek judicial review of the regulation under 16 U.S.C. § 1855(b)(1). In other words, owing to this excessively deferential standard of review, Petitioners were denied their right to judicial review of the regulation in question. Petitioners therefore were not afforded due process of law in accordance with constitutional guarantees. See U.S. Const. amend V and amend XIV, § 1.

The Alliance Against IFQs and other Petitioners (the "Alliance") therefore respectfully request that the Supreme Court of the United States grant the instant Petition for Certiorari to review and reverse the decision of the Ninth Circuit.

A. Statement of Facts

The Individual Fishing Quota (IFQ) program for Pacific halibut and sablefish gave away to a few individuals and corporations who owned or leased vessels fishing privileges worth more than $800 million. At the same time, the program barred from these same fisheries thousands of others, mostly fishermen without an ownership interest in a vessel, who had depended on them for their livelihood. 58 Fed. Reg. 59,405 (50 C.F.R. § 676.16(c)). The Alliance, a group of fishermen from Alaska and Washington, opposed the IFQ program and

its implementation, because the program privatizes a public resource and does so unfairly, and because it drastically changes historic fishing practices, destroying fishermen's lives and their communities.[2/]

1. The IFQ Program

On November 9, 1993, the Secretary of Commerce promulgated a regulation proposed by the North Pacific Fisheries Management Council (the "Council") that would implement a limited access management plan, covering fixed gear fisheries for Pacific halibut and sablefish, off the coast of Alaska. 58 Fed. Reg. 59,375 (preamble to final rule). The rule created "individual

---

[2/] Congress examined IFQ programs during its reauthorization of the Magnuson Act. Amendments to the Act (now known as the Magnuson-Stevens Act) passed by Congress and signed into law by President Clinton preclude approval of any new IFQ programs until October 1, 2000 and require the National Academy of Sciences to develop and submit to Congress a comprehensive report on IFQ programs, to include recommendations to implement a national policy with respect to IFQs. 16 U.S.C. § 1853 (d)(1)(A) and (f)(1).

fishing quota" (IFQ), defined as annual catch limits that could be harvested by a person who has been lawfully allocated "quota share" (QS), defined as a harvest privilege for a specific portion of the "total allowable catch" (TAC) of sablefish or halibut for a specific geographic area. Id. QS were allocated exclusively to persons who owned or leased a vessel that had made legal landing of halibut or sablefish in 1988, 1989 or 1990, the qualifying years. 58 Fed. Reg. at 59,406 (50 C.F.R. § 676.20(a)(1)). Thus, all fishermen were excluded from receiving any QS whatsoever, unless they coincidentally owned or leased a vessel during the qualifying period. Id.

2. Conflicts of Interest on the Council

Of the seven Council members who voted in favor of the IFQ, six had a direct, palpable interest in the outcome: one member was the executive director of the Fishing Vessel's Owner's Association, whose members received a substantial portion of IFQ shares; one member owned freezer vessels and received IFQs; another member owned several vessels and received IFQs; one member, upon leaving the Council, immediately became a lobbyist for the American Factory Trawlers Association; another member,

upon leaving the Council, formed the largest brokerage devoted to the transfer and sale of IFQs; and the family of one member received large IFQ shares.

Despite the obvious conflict of interest on the Council, both the District Court and the Ninth Circuit gave such deference to the Secretary's promulgation of the regulation proposed by the Council that Petitioners were effectively denied judicial review at all.

B. Proceedings Below

The Magnuson Fishery Conservation and Management Act (the "Magnuson Act"), 16 U.S.C. § 1855(b)(1), provides for judicial review of regulations promulgated by the Secretary of Commerce. On November 9, 1993, the Secretary promulgated the above-noted regulation, which Petitioners timely challenged by filing a complaint in the U.S. District Court for the District of Alaska. On December 29, 1994, after oral argument on December 19, the District Court issued an order disposing of all claims and dismissing Petitioner's complaint. The District Court found that the Secretary's action in promulgating the regulation was not arbitrary or capricious.

The Alliance timely appealed that decision to the U.S. Court of Appeals for the Ninth Circuit, which had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291. The Ninth Circuit's decision reflects that the court was obviously disturbed by the effect that the IFQ program would have on fishermen such as Petitioners. Alliance Against IFQs v. Brown, 84 F.3d 343, 352 (9th Cir. 1996). Indeed, the court concluded that the IFQ program "violates the statutory command of fairness and equity to 'all' the fishermen." Id. at 348; see 16 U.S.C. § 1851(a)(1)(A) and 16 U.S.C. § 773c(c). In spite of this statutory violation, however, the court concluded that it could not overturn the Secretary's decision because of the level of deference due. Id. at 352.

ARGUMENT

A. Petitioners were Not Afforded Procedural Due Process Because No Effective Judicial Review Occurred.

The position which Petitioners are advancing here appears to be a somewhat novel one. Yet it is not entirely without precedent: this Court has previously decided cases and announced rules which, if applied in the present context, lead to the conclusion that

petitioners were not afforded procedural due process.

For example, in the context of administrative adjudication, this Court has observed that "a biased decisionmaker is constitutionally unacceptable." Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975). The Court also noted in Withrow v. Larkin that "'our system of law has always endeavored to prevent even the probability of unfairness.'" Id., quoting In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955). This Court has expressly found that the probability of actual bias on the part of the decisionmaker "is too high to be constitutionally tolerable" where "the adjudicator has a pecuniary interest in the outcome." Id. See also McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 484, 111 S. Ct. 888, 892, 112 L. Ed. 2d 1005 (1991) (in action involving the Immigration Reform and Control Act of 1986, Court expressed concern over interpreting statute to deny "meaningful judicial review" of petitioners' statutory and constitutional claims in "the absence of clear congressional language" mandating such result).

Although the present case involves administrative rulemaking rather than

adjudication, many of the decisionmakers had a direct, pecuniary interest in the outcome of their decision. Had the Secretary had such an interest in the outcome, surely she would have been required to recuse herself from the process. In this instance, however, the Council that proposed the IFQ Program and the regulation was composed of members who had a direct pecuniary interest. Because the District Court and the Ninth Circuit gave such deference to the Secretary, however, it effectively shielded this biased decisionmaking from judicial review. In other words, had the courts reviewed the actions of the Council rather than the Secretary, or had the courts applied a less deferential standard of review, the courts may have been rightly offended by the patent conflict of interest present on the Council.

The fundamental question presented in this case, therefore, is whether procedural due process requires the courts below to subject the Secretary's action to a level of judicial scrutiny which gives meaning to the phrase "judicial review," particularly in light of the conflict on the Council. The absence of meaningful judicial review in this case has resulted in insulating the procedural irregularities on the Council from any review at all. Obviously, such

an enormous, and enormously biased, decision should be subjected to judicial scrutiny. Just as obviously, however, the very deferential standard of review applied by both courts assured that this significant decision could not be reviewed.

The obvious conflict of interest of the decisionmaker is only one reason justifying heightened scrutiny in this case. In addition, the Magnuson Act precludes the Secretary of Commerce from designing or modifying any limited access plans submitted by a Council for review.[3/] If the court's review is limited as well, there is, in effect, no review of limited access plans that have such an enormous impact on the lives of thousands of fishermen. Clearly, the Magnuson Act intended -- and expressly provides for -- quite the contrary: judicial review of such plans. See 16 U.S.C. § 1855(b)(1).

[3/] The Act allows the Secretary of Commerce to develop a fishery management plan or to modify a plan developed by a council if it does not limit access to the fishery.

B. **The Promulgated Regulation Also Violates an Express Statutory Mandate.**

Any fishery management plan involving sablefish, as well as any regulation promulgated to implement the plan, must comply with seven national standards:

> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.
>
> (2) Conservation and management measures shall be based upon the best scientific information available.
>
> (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations

> among, and contingencies in, fisheries, fishery resources, and catches.
>
> (7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

16 U.S.C. § 1851(a). Where the Council and Secretary implement a limited access system, however, one of these standards takes on added significance -- the fourth standard.

A fishery management plan involving halibut[4/] is subject to similar restrictions:

> The Regional Fishery Management Council having authority for the geographic area concerned

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4/ Halibut are the subject of the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, signed at Ottawa, Canada, on March 2, 1953, as amended by the Protocol Amending the Convention, signed at Washington, D.C. on March 29, 1979.

may develop regulations governing the United States portion of the Convention waters, including limited access regulations, applicable to nationals or vessels of the United States, or both, which are in addition to, and not in conflict with regulations adopted by the Commission. Such regulations shall only be implemented with the approval of the Secretary, shall not discriminate between residents of different states, and shall be consistent with the limited entry criteria set forth in section 303(b)(6) of the Magnuson Fishery Conservation and Management Act [16 U.S.C. § 1853(b)(6)]. If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen, based

> upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges. . . .

16 U.S.C. § 773c(c) (emphasis added). Thus, statutes require both the sablefish and halibut limited access plans to be fair and equitable to all fishermen.

Although all seven national standards apply generally to conservation and management measures adopted by the Council and the Secretary, National Standard 4 is the only standard which specifically applies to limited access or allocation systems such as the IFQ program at issue here. Standard 4 provides that, "[i]f it becomes necessary to allocate or assign fishing privileges among . . . fisherman," then the resulting allocation must be (A) "fair and equitable to all such fisherman, (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an

excessive share of such privileges." 11 U.S.C. § 1851(a)(4) (emphasis added); see also 16 U.S.C. § 773c(c). Thus, it is apparent that, if the conservation and management measure adopted by the Council and Secretary involves an allocation of fishing privileges, Standard 4 must be adhered to in its entirety, or the measure must fail. Conversely, if the measure does not involve an allocation of fishing privileges, then the measure must merely "not discriminate between residents of different states." Id. In this instance, the lower courts failed to give sufficient weight to these specific, mandatory provisions of Standard 4. The allocation of fishing privileges pursuant to the IFQ program violates this statutory standard, as the Ninth Circuit candidly acknowledged. Alliance Against IFQs v. Brown, 84 F.3d at 348.

The IFQ program is not "fair and equitable" to all fishermen, as it must be. 16 U.S.C. § 1851(a)(4)(A); 16 U.S.C. § 773c(c). On the contrary, it is unfair to any fishermen -- crew members, even skippers -- who did not also own or lease a vessel and make a landing during a qualifying year. Thus, the program fails to satisfy the requirements of Standard 4. Indeed, the program plainly discriminates against fishermen, in favor of owners of the fishing vessles.

The fact that it may be more difficult for the Secretary to administer a plan that is "fair to all fishermen," does not alter the fairness requirement imposed by statute. 16 U.S.C. § 1851(a)(4)(A); 16 U.S.C. § 773c(c). Indeed, the Secretary has the discretion to approve a plan that does not allocate fishing privileges at all. (Such a plan, incidentally, need not be fair to all fishermen -- see id.) A plan such as the present one, however, that does allocate such privileges, must be fair, to all fishermen. Id. Administrative convenience simply cannot overcome a direct statutory mandate such as the one imposed here. Id.

C. The Plan also Violates Timing Requirements Imposed by Statute.

In developing a limited access system, the Council must take into account six factors:

(1) present participation in the fishery;

(2) historical fishing practices in, and dependence on, the fishery;

(3) the economics of the fishery;

(4) the capability of fishing vessels used in the fishery to engage in other fisheries;

(5) the cultural and social framework relevant to the fishery; and

(6) other relevant considerations. 16 U.S.C. § 1853(b)(6); see also 16 U.S.C. § 773c(c).

"Present participation" involves consideration of two aspects: recency of participation and actual participation, that is, fishing. In this instance, the rule fails to take into account both recency and actual participation. As to the first, the rule allocates QS only to those Owners whose vessels landed fish during 1988, 1989 or 1990. The final rule and program, however, did not go into effect until 1995, five years after the close of the qualifying period. Thus, recency was ignored.

As to the second, only Owners received QS, even though they may never have baited a hook or caught a fish. Conversely, no fishermen who were not also Owners or Lessees received QS, even though they depend on fishing for their livelihood. Clearly, "participation" was ignored as well.

A District Court decision in Seawatch Int'l v. Mosbacher, 762 F. Supp. 370 (D.D.C. 1991), is instructive. In Seawatch, the court upheld a limited access system[5/] against a challenge that it did not reflect present participation: the rule was promulgated two years after the cut-off date for eligibility. Id. In contrast, here, there is a five-year gap between the eligibility cut-off date and implementation (1995, 1990). Accordingly, the rule plainly fails to take into account present participation in the fishery, in violation of the statutory command that it must. 16 U.S.C. § 1853(b)(6); see 16 U.S.C. § 773c(c).

Although some cut-off date is not unreasonable, in this instance the original qualifying-year scheme -- 1988, 1989 or 1990 -- failed utterly to reflect "present participation," because the rule did not go into effect until 1995. The Secretary's failure to adhere to strict time limits imposed by statute on the review and promulgation of the final rule

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[5/] In contrast to the Alaska IFQ program, the limited access plan reviewed by the court in Seawatch granted access to the fishery to all fishermen who were participating in the fishery when the plan was developed.

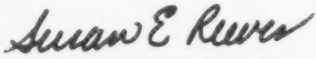
demonstrates the Secretary's total disregard for this present participation requirement. The lengthy delay further supports setting aside the rule, because the Secretary violated these statutory deadlines.

The Magnuson Act requires the Secretary to publish the final rule within 110 days of the receipt date. 16 U.S.C. § 1855(a)(1). In this instance, although the receipt date was October 26, 1992, the Secretary did not publish the final rule until November 9, 1993, more than 379 days later and more than three times the period permitted by statute. Therefore, the Secretary's failure to adhere to the statutory timetable renders the final rule, which implements the IFQ program, legally defective as well.

CONCLUSION

For the reasons stated the petition for a Writ of Certiorari should be granted.

Respectfully submitted this 13th day of November, 1996.



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Defendants-Appellees,

and

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Defendants-Intervenors-Appellees.

No. 95-35077

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

84 F.3d 343; 1996 U.S. App. LEXIS 11676; 96 Cal. Daily Op.

Service 3590; 96 Daily Journal
DAR 5828

August 9, 1995, Argued, Submitted, Anchorage, Alaska

May 22, 1996, Filed

PRIOR HISTORY: Appeal from the United States District Court for the District of Alaska. D.C. No. CV-93-00480-JKS. James K. Singleton, District Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: Susan E. Reeves, Rubini & Reeves, Anchorage, Alaska, for the plaintiffs-appellants.

Martin W. Matzen, United States Department of Justice, Washington, D.C., for the defendants-appellees.

Donald Craig Mitchell, Anchorage, Alaska, for defendants-appellees Western Alaska Fisheries Development Association.

George J. Mannina, Jr., O'Connor & Hannan, Washington, D.C., for intervenors-defendants Knutsen.

JUDGES: Before: Cynthia Holcomb Hall, Charles Wiggins, and Andrew J. Kleinfeld, Circuit Judges. Opinion by Judge Kleinfeld.

OPINION

KLEINFELD, Circuit Judge:

The only issue in this case is whether regulations for implementing a fishery management plan in and near Alaska waters was arbitrary and capricious, or violative of the authorizing statute. We conclude that the regulations were a permissible exercise of authority by the Secretary of Commerce.

I. FACTS AND REGULATORY FRAMEWORK

Commercial ocean fishing combines difficult and risky labor with large capital investments to make money from a resource owned by no one, the fish. Unlimited access tends to cause declining fisheries. The reason is that to get title to a fish, a fisherman has to catch it before someone else does. Pierson v. Post, 3 Caines 175, 2 Am. Dec. 264 (N.Y. 1805). This gives each fishermen an incentive to invest in a fast, large boat and to fish as fast as possible. As boats and crews get more efficient, fewer fish escape the fishermen and live to reproduce. "The result is lower profits for the too many fishermen investing in too much capital to catch too few fish." Terry L. Anderson and Donald R. Leal,

Free Market Environmentalism, 123 (1991).

Congress made findings in the Magnuson Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801 et seq., that "certain stocks of such fish have been overfished to the point where their survival is threatened," 16 U.S.C. § 1801(a)(2)(A), and that "[a] national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to ensure conservation, and to realize the full potential of the Nation's fishery resources." 16 U.S.C. § 1801(a)(6). Among the purposes of the Magnuson Act were providing for "fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery," 16 U.S.C. § 1801(b)(4), and "establishing Regional Fishery Management Councils to . . . prepare, monitor[ ] and revise such plans." 16 U.S.C. § 1801(b)(5). The Secretary of Commerce, pursuant to the Magnuson Act and the Northern Pacific Halibut Act of 1982 ("Halibut Act"), 16 U.S.C. § 773 et seq., promulgated regulations to limit access to sablefish and halibut fisheries in the Gulf of Alaska and the Bering Sea and Aleutian Islands area. See 50 C.F.R., Part 676.

The Secretary of Commerce implemented by regulation a management plan for sablefish and pacific halibut fishing. 50 C.F.R. §§ 676.10-676.25. The basic scheme is that any boat that fishes commercially for the regulated fish in the regulated area must have an individual quota share (IFQ) permit on board, specifying the individual fishing quota allowed for the vessel, and anyone who receives the regulated fish must possess a "registered buyer permit." 50 C.F.R. § 676.13(a). The regulated area consists of portions of the Gulf of Alaska, Bering Sea, and waters off the Aleutian Islands. 50 C.F.R. § 676.10(b).

The regional director of the National Marine Fisheries Service (NMFS) in the Department of Commerce assigns to each owner or lessee of a vessel which made legal landings of halibut or sablefish during 1988, 1989, or 1990, a quota share (QS) based on the person's highest total legal landings of halibut and sablefish during 1984 to 1990. 50 C.F.R. § 676.20(b). Each year, the regional director allocates individual fishing quotas (IFQs) by multiplying the person's quota share by the annual allowable catch. 50 C.F.R. § 676.20(f)(1). Subject to some restrictions, the quota shares and individual fishing quotas can be sold, leased and otherwise transferred. 50

C.F.R. § 676.21. If someone who did not fish in the regulated waters during 1988 to 1990 wants a quota share, he has to buy it from someone who did.

Like any governmental regulatory scheme, this one substitutes a governmental decision for myriad individual decisions to determine who shall be permitted to make money in the regulated industry. The plaintiffs are people who suffer from the economic impact of the regulation. Some have invested in fishing vessels and fished in the regulated waters for halibut or sablefish, but not during the critical three years which would give them a quota share. Some have consistently fished for the regulated fish in the regulated waters, but did not own or lease the boats. Of those who acquired quota shares under the scheme, some probably never fished, and just invested in fishing boats to get investment tax credits and depreciation. The regulatory scheme has the practical effect of transferring economic power over the fishery from those who fished to those who owned or leased fishing boats. For these reasons, among others, the case is troubling and difficult.

II. ANALYSIS

[1] The district court granted summary judgment in favor of the government and dismissed the complaint. We review a grant of summary judgment de novo. Washington Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1440 (9th Cir. 1991). Where we review regulations promulgated by the Secretary of Commerce under the Magnuson Act, our only function is to determine whether the Secretary "has considered the relevant factors and articulated a rational connection between the facts found and the choice made." Id. at 1440-41 (quotation omitted). We determine only if the Secretary acted in an arbitrary and capricious manner in promulgating such regulations. Id. at 1441. See also 16 U.S.C. § 1855(b)(1)(B); 5 U.S.C. § 706(2)(A)-(D). We cannot substitute our judgment of what might be a better regulatory scheme, or overturn a regulation because we disagree with it, if the Secretary's reasons for adopting it were not arbitrary and capricious.

Plaintiffs urge us to adopt a more onerous standard of review and cite Atwood v. Newmont Gold Co., Inc., 45 F.3d 1317 (9th Cir. 1995), as support. Atwood is distinguishable, because we were reviewing an ERISA plan fiduciary's duty, not those of the Secretary of Commerce, and were doing so in light of facts indicating a conflict of interest.

A. "Present Participation in the Fishery."

Congress erected various conditions on the Secretary's discretion to establish a limited access system for the fishery. Among the factors which the Council and Secretary must "take into account" is "present participation in the fishery." 16 U.S.C. § 1853(b)(6)(A):

> (b) Discretionary provisions. Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may --
>
> . . .
>
> (6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account -
> (A) present participation in the fishery,
> (B) historical fishing practices in, and dependence on, the fishery,
> (C) the economics of the fishery,
> (D) the capability of fishing vessels used in the fishery to engage in other fisheries,

> (E) the cultural and social framework relevant to the fishery, and
> (F) any other relevant considerations;

The Halibut Act provides that limited access regulations "shall be consistent with the limited entry criteria set forth in section [303(b)(6) of the Magnuson Fishery Conservation and Management Act]." 16 U.S.C. § 773c(c).

The final rule was promulgated November 9, 1993. 58 Fed. Reg. 59,375 (1993). But the years during which people had to own or lease vessels and land halibut or sablefish, to obtain qualifying shares, were 1988, 1989 and 1990. 50 C.F.R. § 676.20(a)(1)(i). Plaintiffs argue that this violates the Congressional command to take into account "present" fishing. As they correctly observe, a person who last fished in 1988 would get a qualifying share, but someone who had fished only in 1991, 1992 and 1993 would not. Indeed, the complaint alleges that one of the plaintiffs fished for halibut in the regulated waters in 1975, 1977 through 1987, and 1992, but fished for salmon in Cook Inlet, not part of the regulated waters, during the three quota share years.

Substantial time was taken up between formulation of the plan and promulgation, by such activities as preparing environmental impact statements on the plan. In a 1992 environmental impact statement, the Council gave several reasons for using a 1990 cutoff. Perhaps the most persuasive was that if participation in the fishery while the rule was under consideration had been considered, then people would have fished and invested in boats in order to obtain quota shares, even though that would have exacerbated overcapacity and made no economic sense independently of the regulatory benefit:

> There are two reasons why the end of the qualifying periods is 1990. First, extending it beyond that would have provided an incentive both for additional fishermen to enter the fishery and for previous entrants to adopt extreme fishing methods in order to increase their landings and, therefore, the [quota shares] they would receive if an IFQ program is implemented. This speculative activity would have intensified the race for fish and imposed substantial costs on the fishery in 1991. Second, it would have made it more

difficult for a person to calculate what his [quota share] and IFQ would be by area for each of the alternatives being considered.

Extending the qualifying period past 1990 would benefit those who participated in 1991 compared to those who only participated prior to 1991. It would reward those who increased their participation in the 1991 fishery in the hope that the qualifying period would be extended. It could decrease the credibility of the Council process to the extent that potential or actual participants were led to believe that the period would not be extended. It would result in a broader dispersion of [quota shares] and increase the [quota shares] given to current participants. Finally, it would increase the cost of determining the [quota share] to be given to each person because it would require the use of an additional year of landing records and the resolution of the associated additional discrepancies

> between agency data and vessel owner data.

The Secretary agreed that using a fishing year during the period that the plan was under consideration would exacerbate the overcapitalization problem the scheme was intended to mitigate. Here is his explanation in the Federal Register of November 9, 1993 (the day the final rule was promulgated), under the subtitle "Present participation in the fishery":

> Consideration of later years was abbreviated because the Council, which was formulating this policy in 1991, did not want to exacerbate overcapacity in the fishery by allowing speculative fishing in that year and subsequent years to qualify for an initial allocation of [quota share].

C.F.R. Parts 204, 672, 675, and 676.

This explanation does not fully answer the plaintiffs' argument. They point out that the Secretary did not comply with the statutory timetable for issuing regulations. The Secretary of Commerce has statutory deadlines for every step of the process after receipt of a plan from a Council. 16 U.S.C. §

1854(a). The Secretary violated every time requirement except perhaps the first. The Secretary received the plan from the Council October 26, 1992. 16 U.S.C. § 1854(a)(1)(C) requires that after receipt of the plan, the Secretary "immediately publish" in the Federal Register a notice stating that the plan is available and requesting comments. Notice was published on November 3, 1992. See 57 Fed. Reg. 49,676 (1992). On December 3, 1992, thirty-nine days after the receipt date, the Secretary published the proposed regulations, violating the 15-day requirement in 16 U.S.C. § 1854(a)(1)(D). Instead of allowing sixty days for public comment on the proposed plan, 16 U.S.C. § 1854(a)(1)(C), the Secretary only allowed 38 days. 58 Fed. Reg. 59,375 (1993). The final rule was not promulgated until November 9, 1993, 379 days after the receipt date. Cf. 18 U.S.C. § 1855(a) ("the Secretary shall promulgate each regulation that is necessary to carry out a plan . . . within 110 days after the plan . . . was received"). .

Plaintiffs do not contend these procedural violations deprived the Secretary of jurisdiction to adopt the plan. Cf. Brock v. Pierce County, 476 U.S. 253, 259-60, 90 L. Ed. 2d 248, 106 S. Ct. 1834 (1986); Idaho Farm Bureau Fed'n v. Babbitt, 58 F.3d 1392, 1399-1401

(9th Cir. 1995). They argue, rather, that the Secretary's violations pushed what was supposed to be "present" participation in the fishery further into the past. The Secretary's nine-month delay in promulgating the final regulations, which helped create a three-year period between the last fishing considered and promulgation of those regulations, adds to our concern about whether the Secretary adequately considered "present participation in the fishery," as required by 16 U.S.C. § 1853(b)(6)(A). The question is closer because a portion of this delay is attributable to the Secretary's violation of the statutory timetables.

[2] In the circumstances of this particular regulatory scheme, however, we do not think this delay should change the result. Congress left the Secretary some room for the exercise of discretion, by not defining "present participation," and by listing it as only one of many factors which the Council and the Secretary must "take into account." While the "participation" that the Council actually considered was admittedly in the "past" judged from the time when the final regulations were promulgated, it was roughly "present" with the time when the regulations were first proposed: The Council began its process on this plan in 1990, and considered participation in

1988, 1989, and 1990. The process required to issue a regulation necessarily caused substantial delay. The process of review, publication, public comments, review of public comments, and so forth, had to take a substantial amount of time, see 16 U.S.C. § 1854(a), and the environmental impact review also was lengthy, as it typically is, see 42 U.S.C. § 4332(2)(C). "Present" cannot therefore prudently be contemporaneous with the promulgation of the final regulations.

We further believe that the Secretary had a good reason for disregarding participation in the fishery during this lengthy process, because the alternative would encourage the speculative over-investment and overfishing which the regulatory scheme was meant to restrain. Under the regulations, eligibility for quota shares depends on fishing during the years 1988, 1989, and 1990. Whatever years are used necessarily recede into the distant past. Even in 2005, assuming the regulatory scheme lasts that long, the quota shares will be based on fishing prior to 1991. Future generations of fishermen will continue to be governed by these pre-1991 allocations. Had the Secretary extended the 1990 cutoff, the incentive to pour money and time into the fishery in order to get a bigger quota share, for those

who could afford a long term speculation, would have been enormous.

Thus, while the length of time between the end of the participation period considered and the promulgation of the rule pushed the limits of reasonableness, we are unable to characterize use of a 1988 through 1990 period as so far from "present participation" when the regulation was promulgated in 1993 as to be "arbitrary or capricious." Washington Crab, 924 F.2d at 1441. See also 16 U.S.C. § 1855(b)(1)(B); 5 U.S.C. § 706(2)(A)-(D).

B. The "Fair and Equitable Standard."

Plaintiffs argue that the allocation of quota shares to vessel owners and lessees violates the statutory requirement that allocation be "fair and equitable to all such fishermen." 16 U.S.C. § 1851(a)(4). The statute requires that a fishery management plan comply with a number of national standards:

> (a) In general. Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this subchapter [16 U.S.C. §§ 1851 et seq.] shall be consistent with the following national standards

for fishery conservation and management.

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote

conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

16 U.S.C. § 1851(a) (emphasis added). FN1

FN1 In their reply brief, Plaintiffs argue that the Secretary's final regulations

> violate §§ 1851(a)(1) and 1851(a)(3) as well. Because parties cannot raise a new issue for the first time in their reply brief, Thompson v. CIR, 631 F.2d 642, 649 (9th Cir. 1980), we do not consider these arguments.

Plaintiffs make the sensible argument that a crew member is just as much of a fisherman as a vessel owner. If all the quota shares go to vessel owners and lessees during that period, and none to the crew, as the Secretary's approved plan provides, then this violates the statutory command of fairness and equity to "all" the fishermen.

As the quoted section of this statute shows, the Secretary's duty was not solely limited to allocating quota shares fairly and equitably among the fishermen. The plan also had to "prevent overfishing while achieving, on a continuing basis, the optimum yield," 16 U.S.C. § 1851(a)(1), be "reasonably calculated to promote conservation," 16 U.S.C. 1851(a)(4), "promote efficiency," 16 U.S.C. § 1851(a)(5), "minimize costs and avoid unnecessary duplication," 16 U.S.C. 1851(a)(7), and achieve several other criteria. There is a necessary tension, perhaps inconsistency, among these objectives. The tension, for

example, between fairness among all fishermen, preventing overfishing, promoting efficiency, and avoiding unnecessary duplication, necessarily requires that each goal be sacrificed to some extent to meeting the others.

The Council and Secretary directed their attention to the fairness problem plaintiffs raise, but decided that the other standards imposed by the statute required allocation of quota shares to boat owners and lessees as opposed to all the fishermen. The Council thought that equity to people who had invested in boats, and the greater ease of ascertaining how much fish boats, as opposed to individual fishermen, had taken, favored allocating quota shares according to owner and lessees of boats:

> There is no question that the IFQ program will restructure the current fixed gear fishery for halibut and sablefish. Some fishermen will be better off and some will be worse off under the IFQ program. . . . In brief, those persons benefited by receiving an initial allocation are vessel owners or lease holders . . . . The Council's rationale for this particular allocation is that vessel owners and lease holders

> are the participants who supply the means to harvest fish, suffer the financial and liability risks to do so, and direct the fishing operations.
>
> . . . .
>
> The advantaging of one group to the detriment of another is inherent in allocation . . . . The Council considered allocating [quota share] to crew members but decided against it because of the practical difficulties of documenting crew shares. Instead, the Council decided to give eligibility for initial allocations only to vessel owners and lease holders because they have a capital investment in the vessel and gear that continues as a cost after crew and vessel shares are paid from a fishing trip.

58 Fed. Reg. 59,375, 59,378, 59,386 (1993) (final rule, codified at 50 C.F.R. Parts 204, 672, 675, and 676).

The Secretary thought that the problem of overfishing resulted more from investment in boats than occupational choices of fishermen, so the

administrative remedy should be measured by ownership and leasing of boats:

> The Council's consideration of "present participation" also included the form of involvement in the fishery (e.g., as a vessel owner, crew member, or processor). As explained under national standard 4, above, the Council perceived vessel owners and lease holders as the most directly involved persons in terms of capital investment. The conservation and management problems resolved by this program stem largely from excess capital in the fisheries. Therefore, it is reasonable to define the group of persons who make the capital investment decision to either enter or exit a fishery as "present participants" for initial allocation purposes.

58 Fed. Reg. 59,375, 59,380 (1993) (final rule, codified at 50 C.F.R. Parts 204, 672, 675, and 676). The Secretary promulgated a regulation requiring that allocations be "rationally connected with the achievement of [optimum yield] or with the furtherance of a legitimate [fishery management plan] objective." 50

C.F.R. § 602.14(c)(3)(i)(A). In consideration of the fact that "inherent in an allocation is the advantaging of one group to the detriment of another," the regulation provided:

> The motive for making a particular allocation should be justified in terms of the [fishery management plan]; otherwise, the disadvantaged user groups or individuals would suffer without cause. . . .
>
> (B) An allocation of fishing privileges may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups. An allocation need not preserve the status quo in the fishery to qualify as fair and equitable, if a restructuring of fishing privileges would maximize overall benefits.

50 C.F.R. § 602.14(c).

[3] Congress required the Secretary to exercise discretion and judgment in balancing among the conflicting national standards in section 1851. "Unless the Secretary acts in an arbitrary and

capricious manner promulgating such regulations, they may not be declared invalid." Alaska Factory Trawler Ass'n v. Baldridge, 831 F.2d 1456, 1460 (9th Cir. 1987). Although the Secretary's approval of the plan sacrificed the interest of nonowning crew members to boat owners and lessees, the Secretary had a reason for doing that which was consistent with the statutory standards. Controlling precedent requires that a plan not be deemed arbitrary and capricious, "even though there may be some discriminatory impact," if the regulations "are tailored to solve a gear conflict problem and to promote the conservation of sablefish." Id. The Secretary is allowed, under this authority, to sacrifice the interests of some groups of fishermen, for the benefit as the Secretary sees it of the fishery as a whole. Id.

The plan adopted will undoubtedly have an adverse impact on the lives of many fishermen who have done nothing wrong. Their entirely legitimate interest in making a living from the fishery has been sacrificed to an administrative judgment about conservation of fish and efficiency of the industry. That is, however, an unavoidable consequence of the statutory scheme. Despite the harshness to the fishermen who were left out, there is no way we can conclude on this record that the Secretary lacked a

rational basis for leaving them out. The Secretary considered their interests, "considered the relevant factors and articulated a rational connection between the facts found and the choice made." Washington Crab, 924 F.2d at 1441. Because this standard was met, we do not have the authority to substitute our judgment for the Secretary's with regard to allocation of all the quota shares to boat owners and lessees.

C. Primary Port.

As part of the enforcement scheme, the Secretary has limited where fish can be unloaded and transferred from the harvest vessels. An "IFQ landing" is defined as "the unloading or transferring of any IFQ halibut, IFQ sablefish, or products thereof from the vessel that harvested such fish." 50 C.F.R. § 676.11. The general scheme for landings involves vessels clearances, with National Marine Fisheries Service inspection of individual fishing quota permits, buyer permits, and regulated halibut and sablefish. "Unless specifically authorized on a case-by-case basis, vessel clearances will be issued only by NMFS enforcement officers at . . . primary ports." 50 C.F.R. § 676.17(a)(4). The regulations list as "primary ports" 16 towns in Alaska, and Bellingham, Washington. Plaintiffs argue that the

inclusion of Bellingham, Washington, on the list was inappropriate. Listing Bellingham means, as a practical matter, that some vessels will harvest regulated fish in waters off Alaska, but the National Marine Fisheries Service will not clear the fish for sale until they get to Bellingham.

The regional fishery management council recommended that all clearances be at Alaska ports. Some of the federal fisheries regulators in Alaska, as well as fishermen in Alaska, were concerned that once the boats got away from Alaska, they could cheat by selling fish before they got to a non-Alaskan port. There is a lot of ocean between Alaska and Washington.

The Secretary added Bellingham to the list, despite this concern, for two reasons. First, the Secretary was concerned that if all fish had to be cleared at an Alaskan port, then the second sentence of the Ports Preference Clause of the United States Constitution would be violated. The Ports Preference Clause says:

> No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or

> from, one State be obliged to enter, clear, or pay Duties in another.

Const. art I, § 9, para. 6. The Secretary did not make a finding that the clause would be violated, but rather chose to avoid possible litigation over the question by adding a non-Alaskan port. Second, the Secretary elected to put Bellingham on the list, because it was an historic port for selling Alaskan halibut and sablefish. 58 Fed. Reg. 59,375, 59,392.

Plaintiffs argue that the Secretary had no authority to amend the fishery management plan by adding Bellingham, and could only approve the plan, disapprove it, or partially disapprove it. Under their interpretation, the Secretary should have sent the plan back to the regional council rather than adding a non-Alaskan port on his own.

Congress distinguished the Secretary's powers to alter the "fishery management plan" which the regional council submits, 16 U.S.C. § 1853(a), from his power to alter "regulations which the Council deems necessary or appropriate for purposes of carrying out a plan," 16 U.S.C. § 1853(c). Congress specifically empowered the Secretary to "make such changes in the proposed

regulations submitted for the plan . . . as may be necessary for the implementation of the plan." 16 U.S.C. § 1854(a)(1)(D)(i). The Secretary does not have the same powers over the plan: If "the Secretary determines that the plan . . . is not consistent with the criteria, . . . the Secretary shall notify the Council in writing of his disapproval or partial disapproval of the plan," 16 U.S.C. § 1854(b)(2). That way, "the Council may submit a revised plan or amendment, accompanied by appropriately revised proposed regulations, to the Secretary." 16 U.S.C. § 1854(b)(3)(A). Plaintiffs argue that the Secretary could not add Bellingham as a port because doing so changed the fishery management plan.

[4] We have no difficulty reconciling subsection (b)(3), which empowers the council to submit a revised plan, with subsection (a)(1)(D)(i), which allows the Secretary to make changes on his own in the implementation regulations.. Subsection (a)(1)(D)(i) authorizes the Secretary to change regulations which the Secretary deems necessary for implementation, without sending the plan back to the council. Designation of the locations for National Marine Fisheries Service vessel clearance was an enforcement concern which the Secretary could properly control in the

implementation regulations. We therefore have no occasion to decide whether the Secretary could change the fishery management plan itself without sending it back to the council.

Plaintiffs argue that the practical effect of adding Bellingham to the implementing regulations is to make enforcement of the plan itself entirely impractical, so that the Secretary's amendment of the regulations should be treated as a change in the plan itself. They cite a memorandum from the Director of the National Marine Fisheries Service, Alaska Enforcement Division, saying that enforcement could not be accomplished if a Washington port were added. This is a matter of judgment entrusted to the Secretary, and although he reached a conclusion contrary to the recommendation of a knowledgeable subordinate in his department, the Secretary's judgment is not arbitrary and capricious.

D. Preemption Hearing.

The statute provides that "nothing in this [Act] shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." 16 U.S.C. § 1856(a). If the Secretary finds "after notice and an opportunity for hearing" that "any state has taken any action . . . which will

substantially and adversely affect the carrying out of [his] fishery management plan," then "the Secretary shall promptly notify such State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State." 16 U.S.C. § 1856(b)(1). This statute also provides that a state may later seek reinstatement of its authority over an area over which the Secretary has previously asserted jurisdiction. 16 U.S.C. § 1856(b)(2). Plaintiffs argue that the Secretary violated this state sovereignty provision of the statute by not giving notice and holding a preemption hearing before asserting jurisdiction over Alaskan waters.

Plaintiffs argue that the Secretary violated this state sovereignty provision of the statute, by not giving notice and holding a preemption hearing before determining that the fishery was "predominantly within the exclusive economic zone and beyond such zone," 16 U.S.C. § 1856(b)(1)(A), and that the State of Alaska had taken or omitted to take action which would "substantially and adversely affect the carrying out of such fishery management plan." 16 U.S.C. § 1856(b)(1)(B).

Plaintiffs argue that the State of Alaska did not protect the fishermen's

rights to a hearing on whether preemption of state authority was proper, so the fishermen should be enabled to enforce this statutory right themselves. In an amicus memorandum filed in district court, the State of Alaska said that it "joins with federal defendants and intervening defendants in countering plaintiffs' attempts to invalidate the [IFQ] program." However, "the state's support of the current federal IFQ program does not represent a waiver of the state's present and future fisheries management interests in state waters." We assume without deciding, for purposes of this portion of the discussion, that the Secretary did violate the State of Alaska's right to notice and a hearing before the federal government preempted the state's authority to regulate fishing in its own waters.

[5] The State of Alaska, as a sovereign, and not the plaintiffs, would be the party affronted by interference with its sovereignty. Federal regulation of fishing in state waters interferes with the state's power to regulate conduct within its borders. The fishermen, being citizens of both the State of Alaska and the United States, and fishing within both, are subject to regulation by both. The invasion of the State of Alaska's sovereign interest in the power to regulate an activity within

its own territory is not "an invasion of a legally protected interest," Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), of the fishermen. The state could have, had it prevailed in a preemption hearing, imposed greater burdens on the aggrieved fishermen than did the federal government. We intimate no view on whether the State of Alaska would have been entitled to a hearing under section 1856, had it demanded one. The State of Alaska elected not to take action to protect whatever sovereign rights the state might have in this regulatory regime, and the sovereign rights belong to the state, not the individual fishermen. Failure to hold the statutory preemption hearing created no infirmity of which the fishermen could take advantage in this litigation.

III. CONCLUSION

This is a troubling case. Perfectly innocent people going about their legitimate business in a productive industry have suffered great economic harm because the federal regulatory scheme changed. Alternative schemes can easily be imagined. The old way could have been left in place, where whoever caught the fish first, kept them, and seasons were shortened to allow enough fish to escape and reproduce. Allocation

of quota shares could have been on a more current basis, so that fishermen in 1996 would not have their income based upon the fish they had caught before 1991. Quota shares could have been allocated to all fishermen, instead of to vessel owners and lessees, so that the nonowning fishermen would have something valuable to sell to vessel owners. But we are not the regulators of the north pacific halibut and sablefish industry. The Secretary of Commerce is. We cannot overturn the Secretary's decision on the ground that some parties' interests are injured. Government regulation of an industry necessarily transfers economic rewards from some who are more efficient and hardworking to others who are favored by the regulatory scheme. We have authority to overturn the Secretary's decisions only if they are arbitrary and capricious, or contrary to law. In this case, they are not.

AFFIRMED.

APPENDIX B - Alliance Against IFQs, et al; v. Ronald H. Brown, et al and Peter M. Knutsen, Case No. A93-480 CV ORDER Dated 12/29/94

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
JUDGMENT IN A CIVIL CASE

Alliance Against IFQs, et al,)
)
Plaintiff.)
)
vs.)
)
Ronald H. Brown, et al)
)
Defendant.)
)

Case Number A93-480 CV (JKS)

_____ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XXXXX **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT plaintiffs complaint is dismissed with prejudice.

APPROVED:

/s/ James K. Singleton
U.S. District Court Judge

12/29/94
Date

/s/ Phyllis Rhodes
Clerk

/s/ Sharon M. Fuhrer
(By) Deputy Clerk

APPENDIX C - Alliance Against IFQs, et al; v. Ronald H. Brown, et al and Peter M. Knutsen, Case No. A93-480 CV ORDER Dated 12/29/94

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA

Alliance Against IFQs, et al,
Plaintiff,
vs.
Ronald H. Brown, et al.
Defendants.
and
PETER M. KNUTSEN, et al.
Intervenor-Defendants.

ORDER

Case No. A93-480 CV (JKS)

I. INTRODUCTION

This case deals with certain federal regulations promulgated on November 9, 1993 which significantly change halibut and sablefish (a.k.a. Black Cod) fishing

off the coast of Alaska.[1/] The regulations at issue were promulgated by the Secretary of Commerce pursuant to the Magnuson Fishery Conservation and Management Act (Magnuson Act) (pertaining to sablefish fishing), and the Northern Pacific Halibut Act of 1982 (Halibut Act) (pertaining to halibut fishing), 16 U.S.C. §§1801-1882 and 16 U.S.C. §§ 773-773k, respectively.[2/] The new regulations, among other things, create Community Development Quotas ("CDQ") and Individual Fishing Quotas ("IFQ") for the halibut and sablefish industry. Plaintiffs challenge the regulations on numerous grounds.

[1/] The federal regulations govern commercial fishing conducted in the Exclusive Economic Zone ("EEZ"). The EEZ is the 197 miles seaward of the Alaska territorial sea.

[2/] Because commercial halibut fishing is subject to a treaty between the United States and Canada, the regulations pertaining to halibut fishing were approved under the Halibut Act. The sablefish fishing industry, however, is not governed by a treaty between the United States and Canada. As a result, the new regulations pertaining to sablefish fishing were approved under the Magnuson Act.

At oral argument on December 19, 1994, the Court provided a tentative decision to dismiss Plaintiffs' case,[3/] and set forth some of its reasons pertaining to Plaintiffs's claims. Plaintiffs were afforded an opportunity to respond and then the Court finalized its tentative decision.[4/] The Court takes

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[3/] At oral argument, the Court referred to docket No. 66 as Intervenor-Defendants' cross-motion for summary judgment. Rather than being filed together, Intervenor-Defendants apparently filed the motion and memorandum in support of the motion separately, thus receiving separate docket numbers. As a result, the Court inadvertently granted the memorandum at Docket No. 66, instead of the motion at Docket No. 65. Intervenor-Defendants' motion at Docket No. 65 is therefore GRANTED.

[4/] See Docket No. 92 (denying Plaintiffs' motion for summary judgment at Docket No. 62; granting Intervenor-Defendants' cross-motion for summary judgment at Docket No. 65; incorporating Federal Defendants' cross-motion for summary judgment at Docket No. 70 into Docket No. 65 and granting such motion; and dismissing as moot -- due to the

(continued...)

this opportunity to provide a written response to Plaintiffs' comments regarding the Court's decision. In her response, counsel for Plaintiff's specifically addressed three issues: 1) the establishment of a non-Alaskan clearance port in Bellingham, Washington; 2) the limited access, or cut-off date; and 3) state and federal law pre-emption issues. These issues are set forth below. seriatim.

A. Port Clearance Requirement

In the Court's tentative decision, Plaintiffs port clearance argument was characterized as a "red herring." Plaintiffs took offense to such characterization and provided an explanation for their position. Support for Plaintiffs' position was two fold. First, Plaintiff argued that the addition of an out-of-state port for clearance will significantly increase under-reporting and un-reporting. Second, it was contended that the Secretary illegally failed to consider the advise

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1/(...continued)
decisions at Docket Nos. 62, 65, and 70 -- the motions for partial summary judgment at Docket Nos. 68 and 69 filed by Defendant Alaska Fisheries Development Assoc.).

and recommendations of reports from N.E.P.A. and Mr. Flannagan. These contentions will be discussed in order.

Plaintiffs argue that reports from N.E.P.A. and Mr. Flannagan, "chief enforcement officer and architect of the entire enforcement plan," indicated to the secretary that there is potential for serious under-reporting and un-reporting problems due to the addition of a clearance port in Bellingham, Washington. By removing the Alaska port clearance requirement, Plaintiffs argue, the only enforcement mechanism that existed, clearance within Alaska, is removed. Plaintiffs further argue that the geography of Alaska is such that the addition of a Washington port creates hundreds of additional miles of coastline and thousands of landing sites between Anchorage and Bellingham. As a result, Plaintiffs maintain, too many vessels will slip through undetected.

Plaintiffs' argument is unpersuasive. Even if the proper focus of the Court's review is to evaluate the adequacy or inadequacy of the additional port to the enforcement mechanism, Plaintiffs' arguments miss the mark. First, the proposed enforcement plan included clearance ports from as far west as Dutch Harbor, on the western eleutian chain, to Craig, on the southeastern

chain of Alaska. There were twelve clearance ports between Dutch Harbor and Craig, spanning approximately 1500 miles.[5/] Plaintiffs' claim that one additional port, a few hundred miles southeast of Craig, creates a geographical problem of astronomical proportions. This argument is simply not convincing. The Court is not convinced that the possibility of illegal unloading between Craig and Bellingham are significantly greater -- to the point that the Secretary was mandated to open new investigations and analysis -- than the possibility of illegal unloading between Dutch Harbor and Craig. The Court is also not convinced that the enforcement mechanism then proposed, ports of clearance located only in Alaska, is significantly impacted to the point that the enforcement mechanism is

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[5/] The distance between Dutch Harbor and its nearest clearance port, Kodiak Island, is approximately 600 miles. Kodiak is approximately 200 miles from Seward. Approximately 700 miles southeast of Seward is Craig. Thus, by traveling along the coastline, a vessel must travel approximately 1500 miles to get from the clearance at Dutch Harbor to the clearance port at Craig. Traveling straight across the Gulf of Alaska, the distance is still nearly 1300 miles.

now totally inadequate due to the addition of a clearance port in Bellingham, Washington. Under-reporting and un-reporting may in fact be an issue with any system that attempts to limit the quantity of fish that any particular person can harvest -- regardless of whether Bellingham is included as a clearance port.

Plaintiffs' second contention is that the agency relied on Mr. Flannagan's beliefs and views only until his views became inconvenient. Further, that so much momentum and political pressure had built up that even a fatal flaw such as the one Mr. Flannagan noted was not going to stop the Secretary from promulgating the regulations. Plaintiffs state that public comment, investigation,a nd analysis was required by law. In support of their contention that the Secretary's [in]action is illegal, Plaintiffs argue that the record is devoid of any evidence supporting the position that removal of the all-Alaska port requirement would not undermine the effectiveness of the enforcement mechanism. Plaintiffs maintain that, as a matter of law, once the Secretary received advice from the chief enforcement officer that the plan had problems, she was required to re-open investigations regarding the effects of the change to the program.

The Court is not satisfied that the addition of one port of clearance significantly changes the plan so as to require that the matter must have been referred back to the Council for further consideration and deliberation. Plaintiffs seek to set aside the administrative decision on grounds that there exist procedural defects. The Administrative Procedure Act governs this issue. There exists substantial Ninth Circuit and Supreme Court precedent setting forth the standards for procedural error. The inquiry necessitates a two step analysis. First, the requirements under the National Environmental Policy Act ("N.E.P.A.") must be analyzed, followed by any additional procedural violations alleged under the A.P.A. The requirements under N.E.P.A. are discussed first, followed by those under the A.P.A.

"NEPA is essentially a procedural statute." Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci, 857 F.2d 505, 508 (9th Cir. 1988) (quoting Oregon Environmental Council v. Kunzman, 817 F.2d 484, 492 (9th Cir. 1987)). "The purpose of NEPA is to ensure that federal agencies are fully aware of the impact of their decisions on the environment." Id. at 507. To effectuate this purpose, agencies are required to take a "hard look" at the environmental consequences

of its actions. Strycker's Ba Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227 (1980). The purpose of this requirement is to provide the Secretary with enough information to, "aid in the substantive decision whether to proceed with the project in light of its environmental consequence." Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1056 (9th Cir. 1985) (citing Trout Unlimited v. Morton, 509 F.2d 1276, 1282-83 (9th Cir. 1974)). "The court will only set aside agency action if it was undertaken without observance of the procedure required by law, or was arbitrary, capricious, an abuse of discretion, or otherwise not according to law." Half Moon Bay, 857 F.2d at 508 (citing Oregon Envt'l Council, 817 F.2d at 492 and 5 U.S.C. § 706 (2)(A & D) of the A.P.A.).

Although the procedural requirements are rather rigid, "[A]gencies must have some flexibility to modify alternatives canvassed in the draft EIS to reflect public input." Half Moon Bay, 857 F.2d at 508. In this case, there had been extensive research, investigation,a nd public input regarding the port clearance system with ports of clearance exclusively in Alaska. See A.R. la-22 at 57139-40. Both before and after proposing tentative regulations with clearance ports exclusively in Alaska,

the Secretary received input regarding clearance ports in Washington and Oregon. See A.R. 1a-22 at 59392. As Plaintiffs' note, the Secretary received significant input from the chief enforcement officer of the enforcement program (Mr. Flannagan). Plaintiffs' rely on the fact that Mr. Flannagan's opinion was contrary to the ultimate determination of the Secretary. The fact of the matter is that the Secretary has the discretionary authority, not Mr. Flannagan. Furthermore, it is not within the powers of the Court to second-guess the weight the Secretary afforded to Mr. Flannagan's opinion. The extensive record regarding the original enforcement program certainly appears to have been sufficient for the Secretary to make an informed, intelligent decision regarding the addition of a Bellingham port of clearance.

Interpretation of the A.P.A. is particularly helpful in determining the most critical question; that is, was the Secretary required by law to re-open discussion, investigation,a nd public comment. A 1990 Ninth Circuit decision answers this inquiry:

> The fact that a final rule varies from a proposal, even substantially,

> d o e s n o t automatically void the regulations. Rather, we must determine whether the inclusion of the [Secretary's] final r u l e w a s i n character with the original proposal and a logical outgrowth of the notice and comment received.

Rybachek v. E.P.A., 904 F.2d 1276, 1287-88 (9th Cir. 1990). In Rybachek, the E.P.A. decided to change its proposed regulations to include in the final regulations Best Management Practices ("BMP"). Mandatory BMPs were strongly encouraged after receiving public comment to the proposed regulations. The final regulations contained mandatory BMPs although the proposed regulations did not mention mandatory regulations, but rather only contained an abbreviated section stating that case-by-case BMPs may be considered. the regulations were challenged on the ground that by promulgating regulations with mandatory BMPs, the E.P.A. was required to re-open the issue for public comment. The appellate court refused to set aside the regulation, determining that the

inclusion of mandatory BMPs in all cases was both very much in character with the original proposal and a logical outgrowth of the notice and comments. Id. at 1286-87, and 1288.[6/]

In this case, the change made by the Secretary was in character with the original proposal and it was a logical outgrowth of the notice and comments received. The addition of another clearance port a few hundred miles south of the southern-most clearance port does not so deviate from the original proposal to necessitate notice and comments above and beyond that which was given. With or without the Bellingham port, the clearance port at Craig is approximately

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[6/] The D.C. Circuit utilizes the same test. Explaining the test, the D.C. Appellate Court stated:

. The agency need not renotice changes that follow logically from or that reasonably dèvelop the rules it proposed originally. Otherwise, the comment period would be a perpetual exercise rather than a genuine interchange resulting in improved rules.

Connecticut Light and Power Co. v. N.R.C., 673 F.2d 525, 533 (D.C. Cir. 1982).

1300 miles southeast of Dutch Harbor. The addition of a Bellingham port, although in another state, does not make the plan differ to the requisite level to set aside the Secretary's decision. The Secretary had previously reviewed the various Environmental Impact Statements conducted, public comment regarding the all-Alaska clearance port system, and comments regarding the addition of a Pugeot Sound port. The Secretary was not required to publish, in advance, every precise proposal it may ultimately adopt as a rule. California Citizens Band Ass'n v. United States, 375 F.2d 43, 48 (9th Cir. 1967). To the contrary, only the, "terms or substance of the proposed rule or a description of the subjects and issues involved" must be published. Rybachek, 904 F.2d at 1287. Accordingly, the Court finds no procedural defect regarding notice.

The Court's final inquiry is the rule of prejudicial error. the A.P.A. provides that a Court must take into account this rule. See 5 U.S.C. § 706. N.E.P.A. review is subject to the same considerations of prejudicial error. Northwest coalition for Alternative to Pesticides v. Lyng, 844 F.2d 588, 595 (9th Cir. 1988). To set aside an agency decision, Plaintiffs must establish that the addition of a clearance port in Bellingham, Washington, without affording public comment, resulted in substantial

prejudice. County of Del Norte v. United States, 732 F.2d 1462, 1466 (9th Cir. 1984), cert. denied, 469 U.S. 1189 (1985). "[I]nsubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside." Id. at 1467 (citing 5 U.S.C. § 706). In a lengthy string citation and parentheticals, the Ninth Circuit Clarified the meaning of prejudicial error. The parentheticals are worth quoting:

> Single alleged oversight on a peripheral issue...must not be made the basis for overturning a decision properly made after an otherwise exhaustive proceeding...Even if [an] agency fails to give notice in [the] statutorily prescribed manner, actual note renders error harmless...Agency decision will not be overturned based on technical error if the agency would have reached the same decision absent the error.

Id. (citations omitted).

In the present case, the Secretary was aware of Mr. Flannagan's opinion regarding the possibilities of high-grading, under-reporting, and un-reporting under the new system. Plaintiff states that Mr. Flannagan is

the expert on the subject. Assuming that Mr. Flannagan is the expert on the subject, it is unlikely that the Secretary's decision would have changed with the addition of public comment.

Review of the N.E.P.A. and A.P.A. requirements results in the finding that Plaintiff's alleged violations are insufficient to set aside the Secretary's promulgation of the regulations at issue in this case. The Court concludes that the Secretary did not violate the procedures set forth in the N.E.P.A. and the A.P.A., and in the alternative, if there was procedural error, the error did not amount to prejudicial error as defined by the Ninth Circuit. Accordingly, the Court will not set aside the promulgated regulations due to addition of the Bellingham, Washington port for clearance.

B. Limited Access

Plaintiff's argue that the provision in the promulgated regulations setting forth the eligibility years for IFQs between 1988-1990 is unfair and thus illegal. We are almost in 1995, Plaintiffs argue, and nearly 60% of the 1988-1990 participants are no longer participating. Those 60% will receive a windfall, Plaintiffs argue. Plaintiffs add, due to the prolonged political

process, what may have been fair a few years ago, is not fair today.[2/] For support, Plaintiffs rely on the Magnuson Act provision stating that present participation must be considered.

Discussions surrounding the open access system have been on-going for many years. When the government began its investigations and let the people know that investigation were underway, all men and women, particularly those in the fishing industry, were put on notice that the government was intending to regulate the industry. Plaintiff agrees that it is not unreasonable to make a cut-off date. It is the duty of the Court to determine whether, in promulgating the regulation, the Secretary considered the present participation in the industry. The record is replete with provision taking into consideration the present participation in the industry. The IFQ itself considers the percentage of fish harvested, the number of persons

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[2/]Plaintiff argues that the government should have completed the process more expeditiously. While making this argument, Plaintiffs also argue that the government failed to fully investigate, should have held more open hearings, etc... Plaintiffs positions conflict, but will be fully considered nonetheless.

receiving quota shares, allows the transfer of quota shares after initial allocation, etc... The Court finds that it is not arbitrary and capricious to limit the initial allocation of quota shares to those persons who satisfy the conditions during 1988-1990.

C. State and Federal Pre-emption Issues

Plaintiffs argue that the Secretary violated the Magnuson Act in failing to hold preemption hearing when extending the IFQ program into state waters. The State of Alaska, in it amicus brief, supports the regulations, but disagrees with the Defendants interpretation of the federal government's preemptive powers. See Docket No. 86 (IFQ issue at 2). Plaintiffs argue that the state is concerned with, and opposes, Federal Defendants' conclusion that federal regulations automatically apply to federally committed vessels fishing in state waters in the absence of state regulation or as long as there is no conflict with an existing state regulation.

There presently does not appear to exist any conflict between state and federal law because the regulations specifically exclude all areas where there exists a potential for conflict. See 50 C.F.R § 676.11 (specifically

excluding state waters covered by state limited entry programs). The State does not object to these regulations and their enforcement. The State objects to the manner by which the federal defendant's defend the regulations in their brief. The difference may very well be a difference of interpretation. Questions regarding the federal government's eventual interpretation and enforcement of the new regulations must be raised by the State of Alaska.[8/] If the State of Alaska later enacts legislation contrary to these regulations, in waters not specifically excluded from coverage, the issue may then be ripe for review. At such time, the validity of the regulations will not be at issue, but rather only specific sections of the regulations because they are severable. See Alaska Airlines v. Brock, 480 U.S.

[8/]Notwithstanding the Court's position that there exists no controversy, there is also an issue regarding standing. A litigant "must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interests of third parties." U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 6720 (1990). At this juncture, the State of Alaska is the only party with the right to object; it did not.

678, 685 (1987). Accordingly, Plaintiffs fail to convince the Court to set aside the promulgated regulations on grounds that the preemptive hearings were necessary.

IT IS THEREFORE ORDERED:

Plaintiffs' motion for summary judgment at **DOCKET NO. 62** is **DENIED.** Intervenor-Defendants' cross-motion for summary judgment at **DOCKET NO. 65** is **GRANTED.** Federal Defendants' cross-motion for summary judgment at **DOCKET NO. 70** is incorporated into Docket No. 65 and **GRANTED.** Finally, the motions for partial summary judgment, filed by Defendant Alaska Fisheries Development Assoc., filed at Docket nos. 68 and 69, are moot due to the decisions at Docket Nos. 62, 65, and 70. Accordingly, the motions at **DOCKET NOS. 68 AND 69** are **DISMISSED.**

DATED at Anchorage, Alaska this 29 day of December, 1994.

/s/ James K. Singleton, Jr.
HONORABLE JAMES K. SINGLETON, JR.
United States District Court Judge

APPENDIX D - Alliance Against IFQs, et al; v. Ronald H. Brown, et al and Peter M. Knutsen, Case No. DC No. CV-93-00480 JKS ORDER Dated 8/15/96

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLIANCE AGAINST IFQS, LADY BLACKIE, INC.; MAKO HAGGERTY; MATHEW DONOHOE NANCY L. LANDE; ADRIAN LECORNU; HOWARD CARLOUGH; JERE MURRAY; PAUL K. SEATON; WILlIAM SULLIVAN; DON HALL,

Plaintiff-Appellants,

vs.

RONALD H. BROWN, SECRETARY OF COMMERCE; CLARENCE B.PAUTZKE, EXECUTIVE DIRECTOR NORTH PACIFIC FISHERY MANAGEMENT COUNCIL; WESTERN ALASKA FISHERIES DEVELOPMENT ASSOCIATION,

Defendants-Appellees,

and

PETER M. KNUTSEN; EDWIN FUGLVOG; ROBERT J. WURM; ANDREW SCALZI; NANCY PHILLIPS, ET AL.,

Defendants-Intervenor-Appellees)
_____)

No. 95-35077
D.C. No. CV-93-00480-JKS

ORDER

Before: HALL, WIGGINS, and KLEINFELD, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E - 16 U.S.C. § 773c(c)

16 § 773c. General responsibility

(a) Secretary of Commerce

The Secretary shall have general responsibility to carry out the Convention and this subchapter.

(b) Adoption of regulations; cooperation with Canadian officials

In fulfilling this responsibility, the Secretary--

(1) shall, in consultation with the Secretary of the department in which the Coast Guard is operating, adopt such regulations as may be necessary to carry out the purposes and objectives of the Convention of this subchapter; and

(2) may, with the concurrence of the Secretary of State, cooperate with the duly authorized officials of the Government of Canada.

(c) Regional Fishery Management Council Involvement

The Regional Fishery Management Council having authority for the geographic area concerned may develop regulations governing the United States portion of Convention waters, including limited access regulations, applicable to nations or vessels of the United States, or both, which are in addition to, and not in conflict with regulations adopted by the Commission. Such regulations shall only be implemented with the approval of the Secretary, shall not discriminate between residents of different States, and shall be consistent with the limited entry criteria set forth in section 1853(b)(6) of this title. If it becomes necessary to allocate or assign halibut fishing privileges among various United States fishermen, such allocation shall be fair and equitable to all such fishermen, based upon the rights and obligations in existing Federal law, reasonably calculated to promote conservation, and carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of the halibut fishing privileges: *Provided*, That the Regional Council may provide for the rural coastal villages of Alaska the opportunity to establish a commercial halibut fishery in areas in the Bering Sea to the north of 56 degrees north latitude during a 3 year development period.

APPENDIX F - 16 U.S.C. §1851

16 U.S.C. 1851

TITLE III -- NATIONAL FISHERY MANAGEMENT PROGRAM

SEC. 301. NATIONAL STANDARDS FOR FISHERY CONSERVATION AND MANAGEMENT

(a) IN GENERAL.--Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title shall be consistent with the following national standards for fishery conservation and management:

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of

fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(b) GUIDELINES.--The Secretary shall establish advisory guidelines (which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans.

APPENDIX G - 16 U.S.C. § 1853

16 U.S.C. § 1853

SEC. 303. CONTENTS OF FISHERY MANAGEMENT PLANS

(a) REQUIRED PROVISIONS.--Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall--

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are--

(A) necessary and appropriate for the conservation and management of the fishery to prevent overfishing, and to protect, restore, and promote the long-term health and stability of the fishery;

(B) described in this subsection (b), or both; and

(C) consistent with the national standards, the other provisions of this Act, regulations implementing recommendations by international organizations in which the United States participates (including but not

limited to closed areas, quotas, and size limits), and any other applicable law;

. . . . .

(b) **DISCRETIONARY PROVISIONS.**--Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may--

. . . . .

(6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account--

(A) present participation in the fishery,

(B) historical fishing practices in, and dependence on, the fishery,

(C) the economics of the fishery,

(D) the capability of fishing vessels used in the fishery to engage in other fisheries,

(E) the cultural and social framework relevant to the fishery, and

(F) any other relevant considerations;

. . . . .

(c) **PROPOSED REGULATIONS.**--The proposed regulations which the Council deems necessary or appropriate for purposes of carrying out a plan or amendment to a plan shall be submitted to the Secretary simultaneously with the plan or amendment for action by the Secretary under sections 304 and 305.

APPENDIX H - 16 U.S.C. § 1855

16 U.S.C. § 1855

SEC. 305. IMPLEMENTATION OF FISHERY MANAGEMENT PLANS

(a) IMPLEMENTATION.--The Secretary shall promulgate each regulation that is necessary to carry our a plan or amendment--

(1) within 110 days after the plan or amendment was received by him for action under section 304(a), if such plan or amendment takes effect under section 304(b)(1);

(2) within 75 days after a revised plan or amendment was received by him under section 304(b), if such plan or amendment takes effect under paragraph (3)(D) of such section; or

(3) within such time as he deems appropriate in the case of a plan or amendment prepared by him under section 304(c) or (f)(3).

(b) JUDICIAL REVIEW.--

(1) Regulations promulgated by the Secretary under this Act and actions described in paragraph (2) shall be subject to judicial review

to the extent authorized by, and in accordance with, chapter 7 of title 5, United States Code, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable; except that--

(A) section 705 of such title is not applicable, and

(B) the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

(2) The actions referred to in paragraph (1) are actions that are taken by the Secretary under regulations which implement a fishery management plan, including but not limited to actions that establish the date of closure of a fishery to commercial or recreational fishing.

(3) (A) Notwithstanding any other provision of law, the Secretary shall file a response to any petition filed in accordance with paragraph (1), not later than 45 days after the date the Secretary is served with that petition, except

that the appropriate court may extend the period for filing such a response upon a showing by the Secretary of good cause for that extension.

(B) A response of the Secretary under this paragraph shall include a copy of the administrative record for the regulations that are the subject of the petition.

(4) Upon a motion by the person who files a petition under this subsection, the appropriate court shall assign the matter for hearing at the earliest possible date and shall expedite the matter in every possible way.

APPENDIX I - U.S. Constitution, Amendment V

U.S. CONSTITUTION
ARTICLE V.

Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX J - U.S. Constitution, Amendment XIV, § 1

U.S. CONSTITUTION
ARTICLE XIV.

§ 1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX K - 58 Federal Register 59, 375 (50 C.F.R. § 676)

58 FR 59375 printed in FULL format.

FEDERAL REGISTER
VOL. 58, No. 215

Rules and Regulations

DEPARTMENT OF COMMERCE (DOC)
National Oceanic and Atmospheric Administration (NOAA)
National Marine Fisheries Service

50 CFR Parts 204, 672, 675, and 676

[Docket No. 921114-3183; I.D. 102892B]
RIN 0648-AD19

National Oceanic and Atmospheric Administration Pacific Halibut Fisheries; Groundfish of the Gulf of Alaska; Groundfish of the Bering Sea and Aleutian Islands; Limited Access Management of Fisheries off Alaska

58 FR 59375

DATE: Tuesday, November 9, 1993

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to implement Amendment 15 to the Fishery

Management Plan (FMP) for the Groundfish Fishery of the Bering Sea and Aleutian Islands area (BSAI), Amendment 20 to the FMP for Groundfish of the Gulf of Alaska (GOA), and a regulatory amendment affecting the fishery for Pacific halibut in and off the State of Alaska (Alaska or State). These regulations establish an individual fishing quota (IFQ) limited access system in fixed gear fisheries for Pacific halibut and sablefish in and off Alaska. In addition, this action implements a Western Alaska Community Development Quota (CDQ) program for halibut and sablefish fixed gear fisheries.

These actions are intended by the North Pacific Fishery Management Council (Council) to promote the conservation and management of halibut and sablefish resources, and to further the objectives of the Northern Pacific Halibut Act of 1982 (Halibut Act) and the Magnuson Fishery Conservation and Management Act (Magnuson Act) [*59376] that provide authority for regulating these fisheries. The IFQ program is intended to resolve various conservation and management problems that stem from the current "open access" regulatory regime. The CDQ program is intended to help develop commercial fisheries in communities on the Bering Sea coast by allowing them

exclusive access to specified amounts of halibut and sablefish in the BSAI.

EFFECTIVE DATE: December 9, 1993, except §§ 676.20(a) through (e) and (g) and 676.21, which will become effective on January 1, 1994, and §§ 675.20(a)(3) introductory text, 676.13(a) and (b), 676.14, 676.16, 676.17, 676.20 introductory text and paragraph (f), 676.22, 676.23, and 676.24, which will become effective on January 1, 1995.

ADDRESSES: Copies of Amendments 15 and 20, and the final supplemental environmental impact statement/environmental impact statement (FEIS) for the IFQ program may be obtained from the Council, P.O. Box 103136, Anchorage, AK 99510 (telephone 907-271-2809).

FOR FURTHER INFORMATION CONTACT: Jay J. C. Ginter, Fishery Management Biologist, Alaska Region, NMFS at 907-586-7228.

SUPPLEMENTARY INFORMATION: The Alaskan fisheries for Pacific halibut (Hippoglossus stenolepis) and sablefish (Anoplopoma fimbria) and the affected human environment are described in the FEIS and in the FMPs. The FEIS incorporates a supplemental EIS (SEIS) with respect to sablefish, regulatory impact reviews (RIRs), initial regulatory

flexibility analyses (IRFAs), and fishery impact statements that assess the potential economic and social effects of this action. Specifically, the FEIS is comprised of the: (1) Draft SEIS/RIR/IRFA regarding sablefish dated November 16, 1989; (2) revised supplement to the Draft SEIS/RIR/IRFA dated May 13, 1991; (3) Draft EIS/RIR/IRFA regarding halibut dated July 19, 1991; (4) Draft SEIS/EIS/RIR/IRFA regarding sablefish and halibut dated March 27, 1992; and (5) Final SEIS/EIS/FRFA dated September 15, 1992, which includes responses to comments received on the March 27, 1992, draft. This entire suite of analyses is referred to hereafter as the FEIS. Unless otherwise noted, however, page or section references to the FEIS refer to the September 15, 1992, document.

The halibut regulatory amendment and Amendments 15 and 20 to the respective FMPs implemented by this action were prepared by the Council and submitted to the Secretary of Commerce (Secretary) for review under provisions of the Halibut Act and the Magnuson Act. The Under Secretary approved the regulatory amendment and Amendments 15 and 20 on January 29, 1993.

The Council does not have an FMP for halibut. The domestic fishery for halibut in and off Alaska is managed by the

International Pacific Halibut Commission (IPHC) as provided by the Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and the Bering Sea (Convention), signed at Washington March 29, 1979, and the Halibut Act. The Convention and the Halibut Act authorize the respective Regional Fishery Management Councils established by the Magnuson Act to develop regulations that are in addition to, but not in conflict with, regulations adopted by the IPHC affecting the U.S. halibut fishery. Under this authority, the Council may develop, for approval by the Secretary, limited access policies for the Pacific halibut fishery in Convention waters in and off Alaska (see discussion in "Consistency" section below). "Convention waters" means the maritime areas off the west coast of the United States and Canada as described in Article I of the Convention (see 16 U.S.C. § 773(d)). The Council acted under this authority in recommending its IFQ program for the halibut fishery. The Under Secretary approved this recommendation on January 29, 1993.

Sablefish fisheries in the exclusive economic zone (EEZ) off Alaska are managed in accordance with the BSAI and GOA groundfish FMPs. Both FMPs were prepared by the Council under authority

of the Magnuson Act. The BSAI FMP is implemented by regulations appearing at 50 CFR 611.93 for the foreign fishery and 50 CFR part 675 for the U.S. fishery. The GOA FMP is implemented by regulations appearing at 50 CFR 611.92 for the foreign fishery and at 50 CFR part 672 for the U.S. fishery. General regulations that also pertain to the U.S. groundfish fisheries appear at 50 CFR part 620.

Background

The problems and issues that the halibut regulatory amendment and Amendments 15 and 20 are intended to resolve are discussed in the FEIS and in the proposed rule (57 FR 57130, December 3, 1992, corrected at 57 FR 61870, December 29, 1992). These include allocation conflicts, gear conflict, deadloss from lost gear, bycatch loss, discard mortality, excess harvesting capacity, product wholesomeness, safety, economic stability in the fisheries and fishing communities, and rural coastal community development of a small boat fleet.

Implementation of the IFQ program for halibut and sablefish fixed gear fisheries culminates more than 5 years of discussion, debate, and analysis by the Council and NMFS. Beginning in 1987, the Council solicited the views of the

fishing industry and general public on current problems in managing the sablefish fishery including limited access alternatives. In December 1988, the Council decided that the open access status quo was unacceptable for the fixed gear sablefish fishery and expressed a desire to explore the limited access options of license limitation and IFQs. During 1989, the Council identified the 10 conservation and management problems listed above and developed a draft supplemental EIS that analyzed four alternative management regimes, including continued open access (status quo), license limitation, IFQs, and annual fishing allotments. At its meeting in January 1990, the Council decided to focus on IFQ options as an alternative to the status quo. The Council considered a series of analyses of IFQ options throughout 1990 and early 1991. In addition, in early 1991, the Council found that management problems in the fixed gear sablefish fishery also afflicted the halibut fishery. Therefore, the Council decided to consider similar alternative IFQ systems for the halibut fishery with the intent that a single IFQ program would be applied to both fisheries. A draft EIS assessing the potential effects of alternative halibut IFQ programs was prepared and made available for public comment on August 2, 1991 (56 FR 37094).

At its meeting in September 1991, the Council tentatively selected a preferred IFQ alternative for both fisheries and announced its intention to make a final decision on the preferred alternative at its meeting in December 1991. Meanwhile, an agency/industry IFQ implementation team, established by the Council, reviewed the Council's tentative recommendation for practical difficulties. After receiving additional public comment and recommendations of the implementation team, the Council, on December 8, 1991, approved the halibut and sablefish fixed gear fishery IFQ program for Secretarial review.

Council staff prepared a supplement to the draft EIS after the Council, at its meeting in January 1992, requested additional analysis of the potential effects of the preferred IFQ alternative. This additional supplemental analysis was made available to the public on [*59377] March 27, 1992. At its meeting in April 1992, the Council received additional public comment on the proposed IFQ program and the March 27, 1992, analysis, and reconfirmed its original decision to recommend the halibut and sablefish IFQ program to the Secretary. A 45-day public comment period on the draft EIS was announced on May 15, 1992 (57 FR 20826).

The Director, Alaska Region, NMFS (Regional Director), made a preliminary evaluation of all documents relevant to the Council's IFQ recommendation and determined that they were sufficient in scope and substance to warrant public and Secretarial review. The official "receipt date" of the Council's IFQ program recommendation is October 26, 1992. A notice of availability of the FMP amendment was published on November 3, 1992 (57 FR 49676), and the proposed rule was published on December 3, 1992. A notice of availability of the FEIS was published on December 11, 1992 (57 FR 58805). Ninety-two letters of comment were received on the proposed rule. After careful consideration of the comments, key issues raised during Council development of the IFQ program, the FEIS, and the public record, the Secretary, on January 29, 1993, approved the recommended IFQ program in its entirety.

Consistency With Magnuson Act and Halibut Act Provisions To Establish Limited Access Management Regimes

The Secretary is authorized by sections 304 and 305 of the Magnuson Act to approve and implement an FMP or FMP amendment recommended by the Council if the FMP or amendment is consistent with the national standards at section 301,

other provisions of the Magnuson Act, and other applicable laws. One key provision of the Magnuson Act is section 303(b)(6), which specifies factors that the Council and the Secretary must consider in developing a limited access system. With respect to halibut, section 5(c) of the Halibut Act authorizes the Secretary to implement limited access regulations for the U.S. halibut fishery. Such regulations must be consistent with the Halibut Act and section 303(b)(6) of the Magnuson Act, and must not be in conflict with IPHC regulations. The following discussion reviews the Secretary's findings of consistency with these key statutory requirements.

National Standard 1

This national standard requires conservation and management measures to prevent overfishing while achieving, on a continuing basis, the optimum yield (OY) from the fishery. Although separate issues, the prevention of overfishing and the achievement of OY are related. In effect, the most important limitation on the specification of OY is that management measures designed to achieve it must also prevent overfishing. "Overfishing" is defined in the NOAA Guidelines for Fishery Management Plans (Guidelines), 50 CFR part 602, as a level or rate of fishing mortality that

jeopardizes the long-term capacity of a stock or stock complex to produce maximum sustainable yield on a continuing basis (§ 602.11(c)).

The Council has developed an objective and measurable definition of overfishing groundfish as required by the Guidelines. The Council annually specifies the total allowable catch (TAC) of sablefish to assure that harvesting up to its TAC does not cause overfishing of the sablefish stock. The IPHC follows a similar process in establishing the annual catch limits for halibut.

The IFQ program will not change the process by which the Council and the IPHC respectively establish the sablefish TACs and halibut catch limits, but rather will modify the distribution of harvesting allocations among fishermen. Therefore, the IFQ program sustains existing management measures that prevent overfishing. Further, the IFQ program will improve the prevention of overfishing by providing for reductions in bycatch and deadloss that normally increase with increased fishing effort in open access fisheries. The slower paced fishery that is anticipated under the IFQ program will reduce fishing mortality caused by lost fishing gear and bycatch because gear conflicts will be reduced with fewer fishermen operating over a

longer season, and because fishermen will more carefully set and retrieve their gear to minimize their operating costs. The bycatch of halibut or sablefish in fixed gear fisheries for other species is reduced when fishermen who hold halibut or sablefish IFQ can land those species that would otherwise be discarded. The slower paced fishery also will enhance the ability of NMFS to prevent exceeding the overall TAC or catch limit because the individual landings of fish will be more closely monitored.

The achievement of OY is enhanced as a result of improvements in the prevention of overfishing. Reductions in wastage of fish from bycatch and deadloss are likely to produce increases in future yields. Fishing mortality of young, undersized fish results in a loss of the growth of those fish. This lost growth represents foregone future biomass and potential harvest. The reduction of such loss will increase the benefits to the Nation in terms of potential food production, recreational opportunities, economic, social, and ecological factors. The IFQ program further optimizes the yield from these fisheries by addressing problems associated with allocation conflicts, gear conflicts, deadloss, bycatch loss, discard mortality, excess harvesting capacity, product wholesomeness, safety,

economic stability, and rural coastal development of a small-boat fleet.

National Standard 2

National standard 2 requires conservation and management measures to be based on the best scientific information available. The analytical work and data sources queried in developing the IFQ program were extensive. As explained in the preamble to the proposed rule, a series of four separate analyses comprise the FEIS and were made available for public review over a period of two and a half years. This analytical work relied on the most current landings data, economic, social, and biological information available at the time of the analysis. Data sources are given in reference chapters of the FEIS and its component parts. In addition to the FEIS and the Council's record of debate and public comment, the Secretary considered information presented in comments on the FMP amendments and proposed rule. The Secretary is satisfied that a reasonably comprehensive record of data collection and analysis has been assembled and finds that the IFQ program is consistent with national standard 2.

National Standard 3

This standard requires an individual stock of fish to be managed, to the extent practicable, as a single unit throughout its range, and interrelated stocks of fish to be managed as a unit or in close coordination. The range of halibut and sablefish stocks extends from the northern limits of the BSAI, north and south of the Aleutian peninsula and islands, and throughout the GOA to the U.S.-Canada boundary at Dixon Entrance. These species are found also inside State (territorial sea and internal) waters and in the EEZ. They are found also in Canadian waters and in and off of the States of Washington and Oregon, which are outside the jurisdiction of the Council.

Although national standard 3 does not apply to the halibut IFQ program developed under the Halibut Act, this IFQ program will govern all commercial halibut fishing throughout the range of Pacific halibut in and off Alaska. This fishery accounts for 79.6 percent of the total commercial halibut fishery, based [*59378] on 1993 catch limits. With respect to sablefish, the IFQ program will apply to all fishing with fixed gear in the EEZ and, with limited exception, to fishing with fixed gear in State waters by fishermen with IFQ permits. The sablefish fishery occurs predominately in the EEZ. Several relatively small and

distinct sablefish fisheries (i.e., Prince William Sound, Chatham Strait, and Clarence Strait) within State waters are managed by the State. The IFQ program will not apply to these fisheries. The IFQ program also will not apply to other sablefish fishing with fixed gear that is entirely within State waters by persons fishing without IFQ permits. Such fishing is expected to produce insignificant harvests of sablefish.

The Council included halibut and sablefish in the same IFQ program because these species are interrelated. The IFQ program also requires other species (i.e., Pacific cod and rockfish) to be retained, if caught in association with the IFQ species, to the extent such retention does not violate other State or Federal catch limitations. This management measure purposely recognizes the interrelated nature of the IFQ species with other stocks of fish. Therefore, the Secretary finds the IFQ program consistent with national standard 3.

National Standard 4

Under national standard 4, conservation and management measures shall not discriminate between residents of different states. Further, if it becomes necessary to allocate or assign

fishing privileges among U.S. fishermen, such allocation shall be: (1) Fair and equitable to all such fishermen; (2) reasonably calculated to promote conservation; and (3) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges. The Halibut Act also requires any allocations or assignment of halibut fishing privileges among U.S. fishermen to be consistent with the same standards. This national standard raises two issues, discrimination and allocation.

Discrimination. An FMP must not differentiate among people or corporations based on their state of residency and must not rely on or incorporate a discriminatory state statute (§ 602.14(b)). All fishermen are accorded the same treatment under the IFQ program, regardless of their state of residence, and there is no evidence of discriminatory state statutes in the IFQ implementing rules. The CDQ part of the IFQ program provides special benefits to residents of certain communities on the Bering Sea coast. However, management measures that have different effects on persons in various geographic locations are permissible.

Allocation. An "allocation" or "assignment" of fishing privileges is defined in the Guidelines as direct and

deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals (§ 602.14(c)(1)).

To be consistent with the "fairness and equity" criterion, an allocation should be rationally connected with the achievement of OY or with the furtherance of a legitimate FMP objective. Otherwise, the inherent advantaging of one group to the detriment of another would be without cause. In addition, an allocation of fishing privileges may impose hardships on one group if they are outweighed by the total benefits received by another group (§ 602.14(c)(3)(i)).

The contribution of the IFQ program to the achievement of the BSAI and GOA groundfish OYs is discussed under national standard 1, above, and under the section 303(b)(6) factors below. In addition, the IFQ program will contribute to the achievement of OY by reducing the likelihood of localized and pulse overfishing by spreading fishing effort over more time. Total fishing mortality also should be reduced by providing fishermen with incentive to more carefully deploy and retrieve their gear. This should reduce ghost fishing by lost

gear and reduce discard mortality rates of juvenile undersized fish.

The primary management objectives of the FMP for BSAI groundfish are essentially the same as national standards 1, 2, 4, and 5. The furtherance of these objectives are discussed under these respective standards. The primary management goal of the FMP for GOA groundfish is to maximize positive economic benefits to the United States consistent with resource stewardship for the continuing welfare of GOA living marine resources. Specific objectives to accomplish this goal that are relevant to the IFQ program include minimizing waste and developing fishing effort controls when requested by the industry. As indicated in the FEIS (sec. 6.1), economic benefits to the United States are expected from the IFQ program, although they are not maximized in deference to social concerns. Fishing mortality attributable to deadloss and bycatch discards are reduced as explained above. The IFQ program, which will control fishing effort by controlling access to the resource, was developed at the request of a large part of the fixed gear fishing industry.

There is no question that the IFQ program will restructure the current fixed gear fishery for halibut and

sablefish. Some fishermen will be better off and some will be worse off under the IFQ program. Although the program will not prevent most persons from entering these fisheries, those persons who receive an initial allocation of harvesting privileges will have a competitive advantage over subsequent participants by not having to pay for those privileges. In brief, those persons benefited by receiving an initial allocation are vessel owners or lease holders who owned or leased a vessel that made fixed gear landings of halibut and sablefish at any time during 1988, 1989, or 1990. The Council's rationale for this particular allocation is that vessel owners and lease holders are the participants who supply the means to harvest fish, suffer the financial and liability risks to do so, and direct the fishing operations. Processors typically are not directly involved in harvesting fish, and crew members are rewarded for their labor and risks through a profit sharing system. The FEIS indicates that the Council made a reasonable effort to estimate the benefits and costs imposed by this allocation as compared with alternative allocation schemes, including the status quo.

An allocation of fishing privileges may be considered consistent with the conservation criterion if it encourages a

rational, more easily managed use of the resource, or if it optimized the yield in terms of size, value, market mix, price, or economic or social benefit of the product (§ 602.14(c)(3)(ii)). The IFQ program satisfies this criterion because it allows fishermen to adjust their fishing operations according to weather conditions, market prices, and other factors that currently are discounted in a race for fish during relatively short fishing seasons. This IFQ system will decrease fishing mortality due to discards and bycatch because fishermen will have an incentive to minimize their costs. Fishermen will have an opportunity to land halibut and sablefish that they caught in other fixed gear fisheries that would be otherwise discarded. In addition, the IFQ program will provide an incentive for fishermen to land a premium product that will maximize market value. This will occur as a result of a greater ability for fishermen to coordinate their landings with market variables, and more time while fishing to clean and properly preserve their catch. Hence, the overall yield, in terms of volume and value, from the halibut and sablefish resources [*59379] will be optimized. However, enforcement of IFQ rules is critical to limit the extent to which highgrading and underreporting of harvests subtract from gains in yield.

Finally, consistency with national standard 4 requires avoidance of excessive shares. An allocation must be designed to avoid creating conditions that foster any person or other entity from acquiring an inordinate share of fishing privileges or control by buyers and sellers that would not otherwise exist (§ 602.14(c)(3)(iii)). Although the national standard guidelines do not specifically define an "excessive share," they imply conditions of monopoly or oligopoly. The Council was especially concerned with the effects of consolidation under the IFQ program on current participants and coastal communities. Therefore, the Council recommended a limit on ownership of 1 percent of the total quota share (QS) of sablefish for the BSAI and GOA. These limitations are area-specific for sablefish east of 140 degrees W. longitude, and similar limits for halibut are area-specific. These limits are adopted by the Secretary and appear at § 676.22 (e) and (f) of the final rule. For reasons explained in the preamble to the proposed rule, these limits are imposed on the use of QS rather than its ownership. It is possible that these limits could be concentrated in a single area which could result in localized oligopsony for harvesting or processing. This would not, however, lead to overall market control of the fishery. In

addition, a limit is imposed on the amount of QS that can be used on any single vessel (§ 676.22(h)). Finally, NOAA notes that the allocation scheme can be changed by the Council and the Secretary without permission of the QS or IFQ holders. Such a change may occur if the Council determines that the IFQ program in operation allows for too much or too little consolidation. Therefore, the IFQ program is consistent with national standard 4 with regard to excessive share.

National Standard 5

This standard requires conservation and management measures to promote efficiency in the use of fishery resources, where practicable, except that no such measure will have economic allocation as its sole purpose. The Guidelines recognize that, theoretically, an efficient fishery would harvest the OY with the minimum use of economic inputs such as labor, capital, interest, and fuel (§ 602.15(b)(2)). Hence, an efficient management regime conserves all resources, not just fish stocks. Implementing more efficient management will change the distribution of benefits and burdens in a fishery if it involves the allocation of harvesting privileges. This standard mandates that any such redistribution should not occur without

an increase in efficiency unless less efficient measures contribute to other social and biological objectives.

Although the requirements of national standard 5 do not apply to the halibut IFQ system developed pursuant to the Halibut Act, the Secretary finds that the entire IFQ program, including those measures developed for halibut, is consistent with this standard. This IFQ program provides fishermen an opportunity to reduce economic waste associated with overcapitalization, congested fishing grounds, and fishing mortality due to bycatch discard. Harvesting costs will be lowered because of reduced need for fishermen to carry redundant gear and reduced vessel operating costs (FEIS p. 2-6). The quality and value of fishery products will be increased (FEIS p. 2-4), and there will be increased permanent employment opportunities for crew members and processor workers in coastal communities (FEIS p. 2-12). Processing and marketing costs should decrease as the need to hold large amounts of processed fish in storage until sold is diminished (FEIS p. 2-6). Moreover, the replacement of short intensive fishing seasons with longer, predictable seasons will increase safety at sea and reduce the cost of human capital and equipment invested in the production of halibut and sablefish products. Greater efficiency

may have been achieved; however, the Council minimized disruption to the current social fabric through various restrictions on the use and transfer of QS. The IFQ program also will provide biological benefits in terms of reduced discard and deadloss waste, and enhanced prevention of overfishing. These social and biological considerations indicate that economic allocation is not the sole purpose of the IFQ program.

National Standard 6

National standard 6 requires that management measures allow for variations among, and contingencies in, fisheries, fishery resources, and catches. Variations, uncertainties, and unforeseen circumstances can be experienced in the form of biological or environmental changes, or social, technological, and economic changes. Flexibility of a management regime is necessary to respond to such contingencies (§ 602.16 (b) and (c)).

Again, although the requirements of national standard 6 do not apply to the halibut IFQ system developed pursuant to the Halibut Act, the Secretary finds the entire IFQ system, including measures developed under the Magnuson Act and the Halibut Act, is consistent with national standard 6. The IFQ program will not

change the way in which the overall halibut and sablefish catch limits are determined. These catch limits respond to changes in stock conditions to the extent that they are based on annual biological estimates. However, the IFQ program provides for increased flexibility for fishermen to adjust their fishing effort to changes in biological or economic conditions. The IFQ program allows fishermen to fish when conditions are most favorable (to the fishermen) and to reduce fishing effort on halibut and sablefish when conditions are less favorable. Under current open access management, a fisherman who wants to participate in these fisheries to any extent is forced to participate during the relatively short fishing seasons, regardless of prevailing economic conditions. The IFQ program will enhance the ability of the fishery to respond to variations and contingencies.

National Standard 7

This national standard requires management measures to minimize costs and avoid unnecessary duplication. Management measures should not impose unnecessary burdens on the economy, individuals, organizations, or governments (§ 602.17(c)).

The requirements of national standard 7 do not apply to halibut regulations developed pursuant to the Halibut Act. Nevertheless, the Secretary finds that this IFQ system, including those regulations developed under the Halibut Act, is consistent with national standard 7. The FEIS (p. 6-2) indicates that the IFQ program will increase administration and enforcement costs by about $ 2.7 million per year, but that annual benefits will be at least $ 30.1 million. In addition, a fisherman is afforded greater flexibility under the IFQ program by adjusting his QS holdings and determining when he will conduct fishing. Fishermen who choose to exit the fishery may receive economic benefit if they sell their QS harvest privilege. The burdens on fishermen who do not receive an initial allocation of QS and on society as employment patterns shift, and other transition costs, are discussed throughout the FEIS.

Magnuson Act Section 303(b)(6)

Section 303(b)(6) of the Magnuson Act provides for the establishment of limited access management systems in order to achieve OY if, in developing [*59380] such a system, the Council and Secretary take into account: (1) Present participation in the fishery; (2) historical fishing practices in, and dependence on, the fishery; (3) the

economics of the fishery; (4) the capability of fishing vessels used in the fishery to engage in other fisheries; (5) the cultural and social framework relevant to the fishery; and (6) any other relevant considerations. Section 5(c) of the Halibut Act also requires any limited access regulations for halibut to be consistent with section 303(b)(6) of the Magnuson Act.

The IFQ program will enhance the achievement of OY by reducing the risk of overfishing, decreasing rates of fishing mortality due to deadloss and discard waste, and increasing economic benefits to fishermen and to the Nation. The risk of overfishing is reduced because consolidation of fishing effort under the IFQ program will lead to a more manageable fishery. The program involves improved reporting systems to determine harvested amounts of halibut and sablefish more accurately. Fishing mortality due to deadloss and discard waste will be reduced as the pace of fishing is slowed. Under the IFQ program, fishermen will maximize the value of their harvest while minimizing fishing costs instead of trying to maximize the amount of fish harvested as in the current open access fisheries. This focus on value and cost will provide an incentive to increase the care taken in setting and retrieving gear. The

incidence of lost fishing gear, and its attendant deadloss due to ghost fishing, will decrease. Gear conflict that results in lost gear also will decline as fishing grounds will be less crowded under a longer fishing season. Catches of legal-sized halibut and sablefish that are made incidental to fishing for other species with fixed gear may be retained if the vessel operator has unused IFQ. This will reduce wasteful halibut and sablefish mortality due to bycatch. The bycatch of non-IFQ species also should be reduced because fishermen will have more time to release carefully these species to maximize their survival. Waste of Pacific cod and rockfish caught in conjunction with IFQ species will be reduced because of the requirement to retain these species unless otherwise directed by other State or Federal rules. Economic benefits to fishermen will result from increased value of their halibut and sablefish landings. Fishermen will be given an increased incentive under the IFQ program to improve handling of their product to reduce spoilage and increase market value. Fishermen will be better able to time their fishing activities with peaks in the market value of halibut and sablefish. Further, fishermen will have an increased interest in the health of the resource as a result of their investment in QS. Economic benefits to the Nation have been

estimated to be in the range of $ 30.1 million to $ 67.6 million (FEIS p. 6-2).

Present participation in the fishery. For purposes of the IFQ program, "present participation" is defined by the initial allocation qualifying criteria: ownership or lease of a vessel that made fixed gear landings of halibut or sablefish at any time during 1988, 1989, or 1990. The Council developed these criteria after consideration of earlier years and ways of participating in the fishery other than by vessel ownership or lease. The Council's rationale for the specified qualifying years was that they provided a reasonable time in which to demonstrate dependence on the fishery. Including earlier years would allow more fishermen to qualify that have since exited the fishery and are no longer participating. Consideration of later years was abbreviated because the Council, which was formulating this policy in 1991, did not want to exacerbate overcapacity in the fishery by allowing speculative fishing in that year and subsequent years to qualify for an initial allocation of QS. Distribution of initial QS to persons participating in any of the 3 qualifying years will allocate QS to some persons who have not participated in 1991, 1992, or 1993, but fewer such persons will

receive an initial allocation than under other options considered by the Council.

The Council's consideration of "present participation" also included the form of involvement in the fishery (e.g., as a vessel owner, crew member, or processor). As explained under national standard 4, above, the Council perceived vessel owners and lease holders as the most directly involved persons in terms of capital investment. The conservation and management problems resolved by this program stem largely from excess capital in the fisheries. Therefore, it is reasonable to define the group of persons who make the capital investment decision to either enter or exit a fishery as "present participants" for initial allocation purposes. The IFQ program does not deny the opportunity for other participants to continue participating as they have done as crew members or in some other capacity. The extent to which employment opportunities are likely to be affected is discussed in sections 2 and 3 of the FEIS..

Historical fishing practices in, and dependence on, the fishery. The Council considered a person's record of landings in a fishery as the most important indicator of that person's dependence on the fishery. Investment in, or size of, a vessel was rejected as an important

indicator because small vessels may sometimes harvest more fish than large vessels. Equal allotments would benefit participants with relatively low landings at the cost of those with relatively high landings (FEIS sec. 7.0). The Council also considered the unique characteristics of the halibut and sablefish fisheries in formulating the IFQ program. The fact that these fisheries are prosecuted mostly by small, owner-operated vessels was repeated often in public testimony. The Council also was aware of the special relationship between vessel owners and fish processors, and vessel owners and crew. Council consideration of these current practices and dependencies resulted in numerous limitations on control, use and transferability of QS. These limitations stem from a profound concern that the IFQ program could cause too much change in current fishing practices. A general description of the fishery is given in the FEIS.

Economics of the fishery. The economics of the halibut and sablefish fishery were a central concern to the Council and a motivating influence to develop the IFQ program. Six of the ten conservation and management problems identified by the Council are economic problems (see "Background" above). Moreover, as a resolution to these

problems, the IFQ program will have economic effects on the fishery. The Council's consideration of economic factors and the potential effects of the IFQ program and other alternatives is the subject of most of the FEIS.

Capability of fishing vessels used in the fishery to engage in other fisheries. The IFQ program does not require the departure of any vessel from the halibut and sablefish fisheries. However, a reduction in fleet size is expected as owners of less efficient vessels market QS to owners of more efficient vessels (within vessel category limitations). Hence, vessel owners or lease holders voluntarily leaving the IFQ fisheries will be compensated to some extent. This is in contrast to overcapitalized open access fisheries in which exit frequently results from bankruptcy. The FEIS describes the fixed gear fisheries as multi-species. The IFQ program will allow small amounts of QS to be used for the landing of halibut or sablefish that are taken incidental to the targeted harvesting of other species. Fishermen may choose not to acquire large amounts of QS to conduct targeted harvesting of halibut or sablefish. Fixed [*59381] gear fishing vessel owners who choose to hold no QS may use their fishing vessels in other fisheries. The potential effects

on these other fisheries is discussed in the FEIS (sec. 4.0).

Cultural and social framework. Development of the IFQ program has been controversial for the Council and the Secretary primarily because of changes this management policy can bring to the current cultural and social fabric of the fishery. A key concern of the Council was a means of providing for economic rationalization of the fishery while preventing undue cultural and social disruption. Frequent public comment to the Council on cultural and social aspects relevant to the fishery maintained the importance of these issues. The Council considered, described, and assessed relevant cultural and social issues in the FEIS.

Other relevant considerations. Vessel and crew safety was an important consideration in developing the IFQ program. The short and infrequent fishing seasons for halibut, especially in the GOA, often compel fishermen to risk their vessels and lives to fish in poor weather instead of waiting for the weather to clear and miss the fishery. This was one of the 10 problems identified by the Council and is characteristic of overcapitalized open access fisheries. The IFQ program will resolve this problem by allowing fishermen to choose when they

will go fishing within a 9-month period. Fishing can be postponed due to poor weather conditions, if necessary, or when the crew is fatigued. Although the IFQ program will not prevent casualties at sea, it is designed in part to allow fishermen to make sensible judgments that will enhance their safety.

Changes From the Proposed Rule in the Final Rule

The IFQ program implemented by this rule is described at length in the proposed rule notice published on December 3, 1992. The principal parts of the program remain as discussed in that notice. These include initial allocation of QS, annual allocation of IFQ, transfer provisions, limitations on IFQ harvests and QS use, monitoring and enforcement provisions, and the western Alaska CDQ program. However, some changes from the proposed rule are made in the final rule in response to comments received. Changes made in response to comments received are addressed in "Response to Comments" below. Other changes are made to clarify the intent and effectiveness of the regulations and improve their parity with the language of the Council's December 8, 1991, motion approving the IFQ program and the FMP amendment text for Amendments 15 and 20. Principal changes made for clarification purposes are as follows:

1. In accordance with the requirements of section 3507(f) of the Paperwork Reduction Act, § 204.1(b) is revised to include the display of the Office of Management and Budget (OMB) control numbers assigned for the IFQ program.

2. Sections 672.2, 675.2, and paragraph 675.24(c)(1) are removed from the proposed rule. In addition, the term "fixed gear" in § 675.20(a)(3) is changed from the proposed rule to "hook-and-line and pot gear" and the definition of "fixed gear" in § 676.11 is changed from the proposed rule. These changes are necessary to clarify that the sablefish TAC allocation scheme is not changed by the IFQ program. Allocation of sablefish TAC between fishing gears began in the GOA in 1986 and in the BSAI in 1990 pursuant to approved amendments to the respective FMPs. For the GOA, the FMP and its implementing regulations at § 672.24(c) specifically divides the sablefish TAC between hook-and-line gear and trawl gear. These two gear types are defined at § 672.2. Pot gear and other types of gear comprised of hooks and lines (e.g., hand lines, jig, or troll gear) are specifically not allowed to retain sablefish. In the BSAI, the FMP and its implementing regulations at § 675.24(c) divides the sablefish TAC between hook-and-line and pot gears and trawl gear. Again, other gear types are

not allowed to retain sablefish. However, the FMP amendment text for the IFQ program indicates that the program is applicable to the "fixed gear" fishery and defines "fixed gear" as including all hook-and-line fishing gears, including longline, jigs, handlines, troll gear, etc., and pot gear in the BSAI. For consistency with the proposed FMP amendment text, the proposed rule defined "fixed gear" as all groundfish pot gear and hook-and-line gear, including longline, jigs, handlines, troll gear, subject to other gear restrictions in parts 672 and 675. This language would have allowed for the exclusion of pot gear in the GOA, for example, but it also would have required changing the sablefish TAC allocation regulations from the specific "hook-and-line gear" (and pot gear in the BSAI) to the more general "fixed gear." NOAA has determined that such a regulatory change, as contemplated in the proposed rule, would require FMP amendments in addition to the amendments implemented by this final rule; this is because the provisions of the current FMPs that allocate the sablefish TAC among gear types explicitly do not include jigs, handlines, and troll gear (and pot gear in the GOA) and were not modified by these amendments. Hence, the revised "fixed gear" definition in the final rule more clearly specifies which gear types are affected by the IFQ

program and is more consistent with existing FMP requirements on TAC allocation.

The fixed gear definition with respect to halibut includes jigs, handlines, and troll gear in addition to the common setline or hook-and-line gear. This difference between sablefish and halibut fisheries results from the more general "hook-and-line gear" specified at § 301.17 as required for the harvesting of halibut. This regulation allows any gear that uses hooks and lines to harvest halibut. Hence, jigs, handlines, and troll gear that employ hooks and lines can be used to land halibut under the IFQ program. Another simplifying factor is that the halibut catch limit is not specifically allocated between trawl and other gear types.

3. The definition of "catcher vessel" is changed by making an exception for a freezer vessel that acts as a catcher vessel during a fishing trip. This change clarifies § 676.22(i)(3) which allows the use of catcher vessel IFQ on a freezer vessel provided that no processed products of any species are onboard the vessel during a fishing trip on which catcher vessel IFQ is being used. This change also improves the distinction between the two types of vessels based on

whether processing occurs during a fishing trip or during a fishing year.

4. The definition of "dockside sale" is moved to the definitions section (§ 676.11) from § 676.14(d) because the term is used also in other paragraphs. The definition is revised to clarify that dockside sales are transfers of IFQ fish from the harvester to individuals for personal consumption, and not for resale. Such transfers to non-registered buyers will require the harvester to hold a registered buyer permit in addition to an IFQ permit and card. Further, the text of §§ 676.13(a)(2) and 676.14(d) is revised to clarify the conditions under which registered buyer permits will be necessary, and indicate that landings of IFQ fish outside of an IFQ regulatory area or the State of Alaska must be treated in the same manner as a dockside sale. These changes are made to clarify the requirements of dockside sales and IFQ landings outside of an IFQ regulatory area or the State of Alaska. The changes also clarify the reporting requirements of registered buyers.

5. The definition of the sablefish CDQ reserve is changed to reflect the correct proportion of the sablefish fixed gear [*59382] TAC as 20 percent. The proposed rule incorrectly specified 12 percent. Notice of this mistake was

published on December 29, 1992 (57 FR 61870).

6. IFQ permits will not include the metric tonnage of the initial allocation for the permit holder. Instead, a statement will accompany the permit which will indicate the amount allocated to the IFQ permit holder. Sections 676.13(b)(1), 676.20(f)(3), and 676.21(e) were reworded to reflect this change.

7. A new paragraph is added at § 676.16(b) to prohibit the intentional submission of false information. In combination with § 676.16(a), the new paragraph emphasizes the need to provide truthful, accurate information on any reports, applications or statements required by the IFQ program. Former § 676.16(b) is redesignated § 676.16(c) and so on through this section.

8. Also in § 676.16, the prohibition against retaining IFQ fish without an IFQ card in the name of "the individual" is changed to "an individual" to clarify that any individual onboard a vessel, who holds an IFQ card with valid IFQ for the IFQ regulatory area and vessel category in which the vessel is operating, may use it to retain halibut or sablefish on the vessel. As used in the proposed rule, this paragraph may have been misinterpreted to mean that only the

person responsible for the harvesting activity, such as the vessel owner or operator, had to have an IFQ card. This interpretation would be inconsistent with provisions for IFQ crew members to add their own IFQ to that of the vessel's owner or operator to increase the harvesting potential of the vessel. One or more IFQ permit and card holders, other than the vessel owner or operator, may harvest IFQ fish from the same vessel, up to the vessel limitations specified at § 676.22(h).

9. Section 676.16 is also changed by deleting former paragraphs (n) and (o), and adding a new paragraph (o). The deleted paragraphs were determined to be redundant. The new paragraph prohibits a person from operating a vessel as a catcher vessel and freezer vessel during the same fishing trip. This change adds clarification to the revised catcher vessel definition at § 676.11 (see also change 3 above).

10. To further clarify qualifications for initial allocations, an addition is made to § 676.20(a)(1) stating that sablefish harvested within Prince William Sound, or under a State of Alaska limited entry program, will not be considered in the determination. Additionally, evidence of legal landings, for initial QS calculation purposes, is specifically

limited to state and Federal catch reports at § 676.20(a)(1)(v). Text is added to this paragraph to clearly specify that a state catch report is an Alaska, Washington, Oregon, or California fish ticket that has been submitted in compliance with regulations of the respective state that were in effect at the time of landing. A Federal catch report is described as a weekly production report submitted in compliance with 50 CFR 672.5(c) or 675.5(c) at the time of landing. Other types of documents that report landings of fish will not be considered evidence of legal landings for purposes of initial allocation of QS.

11. The adjective "initial" is added before QS in § 676.20(b) to emphasize that the modification of QS to accommodate the CDQ program will occur only once with the calculation of the initial QS allocation. The CDQ adjustment will occur at the IFQ level after determination of a preliminary QS. If fishing under the IFQ program begins in 1995, then the TACs used for this purpose will be those specified for 1994. The modified IFQ (after the CDQ adjustment) then will be the basis for recalculating the initial QS. The reason for this approach is that the TACs for halibut and sablefish are not specified until late January or early February. Use of the previous year's TAC specifications will

allow calculation and issuance of initial QS prior to February of the first year of fishing under the program. In addition, this will allow for an ample period of time to effect transfers of QS before the IFQ calculation date specified in § 676.20(f)(2).

12. The confidentiality of proprietary catch data is protected under current state and Federal law. Basically, these regulations prohibit the release of any catch or landings data to anyone other than the person who submitted the state fish ticket or Federal catch report. Exceptions to this rule allow for the release of aggregated data (of 3 or more persons) and the release of data to a third party if the person to whom the data are confidential signs a statement waiving his or her protection of confidentiality. These rules will affect the calculation of initial QS as described at § 676.20(b). The Regional Director will comply with state and Federal laws regarding confidentiality. These confidentiality laws could complicate the initial distribution of QS. If a person who qualifies for an initial allocation of QS had a crew member report a landing on a state fish ticket, the reported catch on that fish ticket would be confidential to that crew member. The Regional Director would not be able to release those landing data to

the qualified person unless the crew member signed a waiver or the qualified person obtained a court-ordered release. This clarification is necessary to alert qualified persons that the application process for QS is subject to state and Federal confidentiality laws and that it is their responsibility to secure the necessary waivers from other persons who may have landed halibut or sablefish on their behalf.

13. The IFQ calculation date in § 676.20(f)(2) of December 31 is changed to January 31 to allow more time for QS transfers to affect IFQ allocations prior to the beginning of the fishing season on March 1 of each fishing year. In addition, this change will allow QS transfers to occur through the annual meeting of the IPHC, at which the current year's catch limit of halibut is established. Calculation of halibut IFQs is partly based on the halibut catch limits established by the IPHC.

14. A new paragraph is added at § 676.20(g) to clarify the interests of QS, IFQ, and permit holders.

15. Two changes are made in § 676.22(e). The first changes the sablefish QS use limit to 1 percent of the combined total sablefish QS instead of the total fixed gear TAC. This change

more accurately reflects the language of the Council's motion and the approved FMP amendment text, and makes this limit consistent with that for halibut in the following paragraph (see response to comment 67). The second change corrects a drafting oversight by changing "140 degrees east" to "140 degrees west" longitude.

16. In § 676.22(i)(2), "sablefish IFQ" is changed to "sablefish QS." This change corrects a drafting oversight and clarifies that the exemption provided in the preceding paragraph applies to initial allocation of sablefish QS consistent with its application to the initial allocation of halibut QS.

17. Section 676.23 is deleted as redundant to §§ 676.10 and 676.11. Former §§ 676.24 and 676.25 in the proposed rule are renumbered as §§ 676.23 and 676.24, respectively.

18. Minor changes to § 676.24 include additional language in paragraph (c) to stress that materials in possession of the State of Alaska pertinent to hearings may be released only under State and Federal confidentiality laws. In paragraph (f)(2)(i), the coast of the Chukchi Sea is added as a location where a community would not be eligible for the CDQ. Also, paragraph (f)(5)(iv)(E) adds a

factor that the Governor must consider prior to recommendation of a CDP. [*59383]

19. Compensations of additional halibut and sablefish QS for amounts foregone due to the CDQ program are clarified by making two changes in § 676.24(i) (formerly § 676.25(i)). First, "IFQ" is changed to "QS." This change improves consistency with the text of the Council's motion. Also, this change should make calculation of the compensation faster because the calculation would be based on the QS pool as of January 31 instead of waiting for final TAC specifications on which to base IFQ calculations. Second, a new paragraph (i)(3) is added to clarify that the compensation will occur only once, in the first year of fishing under the IFQ program, and it will be based on the QS pool in each IFQ regulatory area as of January 31 of the first year of fishing under the IFQ program. These are the same QS pool amounts that will be used for calculating IFQs that year pursuant to § 676.20(f)(2).

20. Explanations for additional changes to the final rule's regulatory text from the proposed rule may be found throughout the Response to Comments section.

Response to Comments

The IFQ program has been controversial in its development, review, and approval primarily because it will fundamentally change the current method of managing the halibut and sablefish fisheries and will limit access to them. Hence, public testimony and comment to the Council, NMFS, and the Secretary has been voluminous. Comments received on the draft SEIS/EIS are summarized and responded to in the FSEIS/EIS. The following summary includes only those comments on the proposed rule that were received by the comment deadline of January 11, 1993. Of these, 49 letters from 62 individuals expressed support for the proposed action while 30 letters from 32 individuals were opposed. Some letters in each category also included attachments of other letters, petitions, and news articles. Points raised in the attachments generally reiterated or reinforced the points made in the letters to which they were attached. Another 13 letters expressed neither support nor opposition but made technical comments or recommended certain changes in the regulations. This group of letters includes several that responded to an expressed interest by the Secretary in comments on efficiency constraints proposed by the Council. Letters of

support and opposition also made specific recommendations for change.

Comment 1: The IFQ proposal intends to allocate publicly-owned common property to a limited class of fishermen, and to use public tax dollars to fund the administration of this program for the benefit of these special interests. The Magnuson Act should be amended to provide the public with a fair return on the public fishery resources to avoid unnecessary windfall profits to a few at great cost to the public. All industries must pay for their raw materials in producing any product for profit. The fishing industry's raw materials are the public's fish which currently are free. The fishing industry should pay the public for the use of its resources and their management.

Response: Neither the Magnuson Act nor the Halibut Act provides authority to charge resource user fees or rents. In the coming months, NOAA will be participating in a broad review of user fees or rents, which will include evaluation of alternatives for applying them in appropriate fisheries. This could result in charging fees for initial and subsequent allocations of QS, IFQ, or landings, or any combination of these, in the sablefish and halibut fisheries. NOAA will seek the views of interested parties

during this review. While the IFQ program will benefit the Nation, and is consistent with current law, public benefits can be increased from resource user fees or rents.

Comment 2: The IFQ program is the only alternative that addresses all ten problems identified by the Council. The IFQ program offers the best chance of solving current industry problems including safety, marketing, and overcapitalization. No other alternative better solves the problems of resource waste, overcrowding, product quality, safety, and bycatch. Problems of discarding, and gear conflict should be resolved by the IFQ program while increasing economic benefits and improving biological conservation. Open access and traditional management techniques are not working. The IFQ program is based on free-market principles commonly used in the private sector; it is a pro-business plan. Current management results in extremely short fishing seasons which are dangerous and wasteful. The IFQ program would reduce waste of bycatch, fuel, fishing gear, ice, cold storage, and loss of life at sea. The program has been thoroughly analyzed and benefits from ample public review and participation in its design over the past 5 years. The unsafe fishing conditions that fishermen are forced to

endure as a result of extremely short openings is a critical flaw of current management. Fisheries management should take responsibility for the safety and welfare of fishermen affected by regulations in addition to conservation and management of the fishery. The program will increase economic benefits from the fisheries and improve biological conservation by making the fisheries easier to manage. Consumers will benefit by having a steady supply of fresh fish to the market. The program is rational; initial allocations reward participation in the fisheries proportionately. Fishermen will have a personal stake in the fishery under the IFQ program which will foster a stewardship attitude toward the resources and their environment. Similar IFQ-type programs have proven successful in other fisheries. The IFQ program should be approved in its entirety. There should be no partial disapproval of transfer restrictions as these are necessary to mitigate socio-economic impacts that will occur if historic delivery patterns are disrupted or the traditionally diverse fleet is displaced. Further prevention of excessive fleet consolidation may be needed.

Response: Comment noted. NOAA agrees with most of these points and supports the IFQ program. However, limited access

regimes are not appropriate for all problems affecting the fishing industry. Some traditional management measures will continue to be used and others may be necessary to prevent overfishing or other conservation problems if the IFQ program is not adequately addressing such problems.

Comment 3: Adoption of the IFQ plan will result in lost jobs for up to 12,000 fishermen in the halibut fleet and 2,600 fishermen in the sablefish fleet. It is unlikely that all of these fishermen will be able to move to other fisheries. The impact of such job loss on communities and fishing-related industries is not fully addressed.

Response: The Council and the Secretary carefully assessed the potential social and economic effects of this IFQ system. Although the number of employment opportunities fishing for and processing halibut and sablefish are likely to decrease with the intended consolidation of the fleet, the fishing and processing positions that remain should be more secure and better paid. The fishing seasons in the halibut and sablefish fisheries currently are so short that most fishermen cannot depend on them for full-time employment. There is little employment security in the halibut and sablefish fisheries currently

under open access management. Extremely short fishing seasons under open access force vessel owners and processing plant operators to rely more on part-time transient labor instead of full-time resident labor. Stability in the [*59384] participation of fishing vessel owners also is not high currently. Of the approximately 8,000 vessel owners who participated in the halibut fishery between 1984 and 1990, only 9 percent participated in all 7 years (FEIS 2.2.18). The IFQ program could provide greater employment security by increasing the use of a coastal community's resident labor force and decreasing the use of transient labor (FEIS 2.2.16). The fishermen likely to leave the fisheries under the IFQ program will be occasional or part-time fishermen. Career or full time-fishermen are more likely to increase their stake in the IFQ fisheries and enjoy greater economic stability and security in their employment than they currently experience.

Comment 4: The IFQ plan is unfair because it would take a public resource worth millions of dollars that everyone has access to and give it to a privileged few. This would unfairly force traditional small-boat fishermen out of the fishery and replace them with large corporations or, like other limited entry programs, will result in rich doctors and

lawyers having the permits. This would prevent many small-boat fishermen from being able to improve their boats and gear. Since most of the benefits of the program would be captured by relatively few individuals, a large number of individuals currently working in the fisheries would be unemployed and increase the burden on social services. Management should spread out access to the resources to keep more people working and protect against the concentration of harvesting by a privileged minority.

Response: Seeking maximum participation in a fishery is a management policy that may be appropriate for some fisheries. The Council did not consider it an appropriate policy to achieve OY from the halibut and sablefish fisheries, however, because it exacerbated numerous conservation and management problems and resulted in wasted value from an important national resource. The addition of more harvesters or more fishing effort to a fishery with a finite production capability at some point will not yield more product. The halibut and sablefish fisheries have surpassed that point, but more fishing effort was continually added in recent years resulting in decreased fishing seasons (FEIS 1.3.2, July 19, 1991, and Fig. 1.1, Nov. 16, 1989) and the 10 conservation and management problems

identified above (see Background). The Council's IFQ management policy is carefully crafted, however, to prevent the opposite extreme of minimizing participation in the fisheries. To the extent practicable, it is designed to retain the social and cultural framework relevant to the fisheries. For example, it includes constraints on the transfer of QS among vessel categories and requires catcher vessel QS holders to be onboard during fishing operations. The traditional small-boat fisherman will not necessarily be forced out of the fishery. However, if he decides to leave the fishery, a small-boat fisherman will likely transfer his QS to another small-boat fisherman. Policies like this reflect the concern expressed by the Council, the fishing industry, and the affected public about excessive consolidation of fishing privileges and disruption of the traditional fixed gear fishing fleet.

Comment 5: The cultural and social framework of the fishery was not taken into account in formulating the IFQ plan. The culture of Alaska contains the philosophy of "common use" and an abhorrence of "exclusive right or special privilege fishery," concepts embodied in the State's Constitution.

Response: The Council and the Secretary adequately took into consideration the cultural and social framework relevant to the fisheries in developing the IFQ program as required by the Magnuson Act and the Halibut Act. Evidence of this consideration is in the FEIS which is comprised of several analyses. These include the original draft dated November 16, 1989, which was supplemented by drafts dated: (1) May 13, 1991; (2) July 19, 1991; and (3) March 27, 1992. The most recent FEIS document, dated September 15, 1992, summarizes and responds to comments on the March 27, 1992 draft. The November 1989 draft contains a description of the economic and social environment (Chapter 3). This section describes commercial fishing activities, their relationship to the processing and marketing sectors, social and cultural characteristics of the fisheries, and coastal communities. Detailed descriptions of fleet structure, population, employment, history, demographics, and culture also are contained in this document or referenced. This analysis examines the likely effects of alternative management strategies and evaluates the efficacy of each alternative. The July 1991, analysis contains a detailed description of the economic and social environment of the halibut fisheries. Chapter 4 of the document compares IFQ management with

open access in regard to 28 parameters including economic stability in affected coastal communities, employment, and anticipated effects on fishing operations. Chapter 5 of the July 1991 document contains a detailed description of the social environment of the halibut fishery. Specific demographic profiles of affected coastal communities are provided that address the relative importance of the halibut fishery to each community and the size, composition, and stability of the resident work force as it relates to fisheries. The March 1992 analysis contained another assessment of potential coastal community impacts (Chapter 3) that includes the potential for QS/IFQ to move away from coastal communities as has occurred in the State's salmon limited entry program. Consideration of the social and cultural framework of the fishery resulted in numerous constraints imposed on the transfer and use of QS and IFQ (§§ 676.21 and 676.22). These constraints will be costly in terms of foregone economic efficiency of the fleet but are nevertheless necessary to prevent undue disruption in the social and cultural framework of the halibut and sablefish fisheries.

Comment 6: The program expropriates existing private property rights in the common property fishery and reassigns property rights to a new group of persons

using arbitrary criteria. Those from whom property rights are taken should be compensated.

Response: There are no private property rights in wild fish before they have been reduced to one's possession. Therefore, no private property has been taken, no property rights have been reassigned, and no compensation is due. The assignment of transferable harvesting privileges to persons who owned or leased a fixed gear fishing vessel that made landings of halibut or sablefish in 1988, 1989, or 1990 is reasonably based on information, available to the Council at the time that it made its decision, on present participation in, and current dependence on, the fisheries.

Comment 7: The IFQ program amounts to a takeover of our natural resources by the Federal Government. Fishermen should not have to pay for a harvesting privilege that is already their Constitutional right.

Response: There is no provision of the U.S. Constitution that guarantees anyone a right to fish. The IFQ program does not amount to a "takeover" of the halibut and sablefish resources by the Federal Government. The Federal Government is responsible under the Magnuson Act and the Halibut Act to conserve and manage

these and other fishery resources for the benefit of the Nation. Limited access management programs are authorized by these laws as necessary to achieve OY. [*59385]

Comment 8: The IFQ program does not privatize ownership rights to individual fish stocks but only to the right to harvest certain species. Therefore, the "race-for-fish" problem is not solved but limited only to a privileged and protected group.

Response: Under open access and license limitation programs, all fishermen harvest fish from the overall catch quota. Therefore, fishermen who harvest faster harvest more fish than slower fishermen by the time the common quota is reached and authorities close the fishery. Under the IFQ program, fishermen, limited by their individual quotas, need not race for a share of the total quota. Instead, they can direct their efforts at reducing the cost of their operations and improving product quality.

Comment 9: The claim that ownership of harvesting rights will promote stewardship of the resource is not true. The long-term detrimental effects of abusive behavior are shared by all industry participants, not just the

abusive individual, thereby reducing incentive for an individual to take responsibility for his own behavior.

Response: Fishermen who hold QS have an individual interest in the halibut or sablefish resource. Individual behavior that degrades that interest, such as underreporting or discarding dead fish that should be counted against an IFQ, could adversely affect the harvesting potential of QS or the future value of QS when the QS holder decides to leave the fishery. As abusive behavior is more likely to be noticed by other fishermen than by the Government, the IFQ program is expected to foster a cooperative effort in enforcing the IFQ rules. Fishermen who invest in the fishery by buying QS will more likely hold a long-term view of their industry and seek to recapture their investment costs and make a reasonable profit year after year. An open access fishery, on the other hand, inspires a short-term perspective because investment or entry costs are relatively low and the costs of resource abuse are spread over a large number of fishermen. Consolidation of the fleet under the IFQ program will increase the cost of resource abuse to individuals remaining in the fishery. The IFQ program will likely inspire more individual responsibility for resource stewardship, not less. Furthermore, it is conceivable

that the underreporting by one IFQ holder that potentially causes the TAC to be exceeded in one fishing year could result in a decreased TAC and correspondingly lower IFQs the following year.

Comment 10: Initial allocation of fishing privileges to "present participants" is only indirectly related to present participation. Fishers' catch history is only the outcome of their participation (i.e., the score of the game). Investment in the fisheries, for example, is more indicative of participation.

Response: The Magnuson Act and the Halibut Act require the Council and the Secretary to take present participation in, and dependence on, the fishery into account in developing limited access systems. The Council chose to use catch history over a specified period of time as an indicator of present participation in, and dependence on, the fishery. NOAA agrees that a person's catch history provides a reasonable indication of that person's participation in, and dependence on, the fishery. Investment also may be an indication of these factors, but investment data would be more cumbersome to use and verify because of difficulties in acquiring and interpreting such data.

Comment 11: The initial allocation to those who invest (in fishing vessels) would unfairly allocate a valuable asset to relatively few fishermen and businessmen who own vessels to the exclusion of the vast majority of fishermen who crew and operate the vessels. This would make vessel owners and lease holders "fishermen" regardless of their participation in the fishing activity of their vessel. Crew members and captains who actually fished would be excluded from receipt of QS regardless of the years of personal investment they have as real fishermen. By discriminating between fishermen who are vessel owners and fishermen who are crew members, the IFQ program would violate the Halibut Act which strictly prohibits discrimination between any fishermen, not just fishermen from different states. Moreover, it would effectively redefine "fishermen" as "investors" and would violate national standard 4 of the Magnuson Act and the Halibut Act, which require allocations to be fair and equitable to all fishermen. Financial investment in the fishery should not be the only criterion for getting QS.

Response: The Council chose vessel ownership or lease as a criterion for initial allocation of QS because of the financial risk that such persons assume in undertaking a commercial fishing

enterprise. Persons who bear this financial risk are the persons who make the decision of whether to enter or exit a fishery and affect the amount of capital in a fishery (see response to comment 13). However, financial investment in a fishing vessel is not the only criterion for receiving an initial allocation of QS. Vessel owners or lease holders also must demonstrate that halibut or sablefish were landed by their vessels during certain years. No investment in a fishing vessel is required to receive transferred QS. Neither term "fishermen" nor "investor" is defined in the Magnuson Act or the Halibut Act. For allocation purposes, a vessel owner or lease holder is a "fisherman" as much as a person who physically handles fishing gear and fish. The Magnuson Act and the Halibut Act authorize such allocations, but stipulate that they be fair and equitable, reasonably calculated to promote conservation, and carried out in a manner such that no particular individual, corporation,.or other entity acquires an excessive share. The Guidelines at 50 CFR 602.14(c) help interpret these criteria. An "allocation" or "assignment" of fishing privileges is defined as a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups or individuals (§ 602.14(c)(1)). The

advantaging of one group to the detriment of another is inherent in an allocation. Allocations do not have to preserve the status quo in a fishery to qualify as "fair and equitable." This criterion can be satisfied if the allocation is rationally connected with the achievement of OY or with the furtherance of FMP objectives, and if the hardship imposed on one group is outweighed by the total net benefits to all. The Council's decision to allocate QS initially to vessel owners and lease holders who made landings of halibut and sablefish during certain years and not to any other U.S. fishermen satisfies this criterion as discussed above under national standards 1 and 4. This allocation promotes conservation and the achievement of OY by encouraging a more rational use of the resource and optimizing the market value of the yield. Net benefits to the Nation are evident from the FEIS (see summary of costs and benefits in FEIS sec. 6.0). Finally, the IFQ rules developed by the Council sufficiently prevent the acquisition of an excessive share either in the initial allocation or subsequent transfer of QS. Therefore, the initial allocation of QS to vessel owners and lease holders and not to crew members is consistent with the anti-discrimination provisions of the Magnuson Act and Halibut Act.

Comment 12: The proposed requirement for an initial allocation of QS does not take into account present participation. It would exclude vessel [*59386] owners with long-term history of participation in the halibut fishery prior to 1988 and subsequent to 1990. The qualifying period for halibut QS should be expanded to include years earlier than 1988. The effect of the 3-year qualifying period on the halibut fishery is to exclude about 2,500 participants from receiving an initial allocation. Most of these participants are small-vessel fishermen. Their exclusion from an initial allocation serves to benefit the large-vessel fishermen. The IFQ program unfairly favors newcomers into the fishery. There should be a "grandfather" provision to award shares to those who pioneered the fishery.

Response: NOAA finds no inherent bias in favor of large vessels in the initial allocation of QS because the distribution of vessel size during the 3-year qualifying period is roughly the same as that immediately before and after the period. When the Council discussed the qualifying period, it reasoned that a qualifying date earlier than 1988 would include fishermen who have since retired or otherwise left the fisheries, and consequently have not demonstrated sufficient present participation in, and

current dependence on, these fisheries to merit an initial allocation of QS. The Council wanted, to the extent possible, to grant initial allocations of QS to currently active participants in the fisheries. However, the Council chose to exclude landings after 1990 because the Council had only incomplete data on 1991 participants when it made its final decision to approve the IFQ program in December 1991. Moreover, the Council chose not to base initial allocations on prospective participation in 1992 and 1993 because this would stimulate entry into the fisheries in those years by persons who have not been historical participants, thereby exacerbating the conservation and management problems that the Council is attempting to resolve.

Comment 13: Crew members do not get paid a wage; everyone shares equally in the risk of a fishing operation. Fishing is a share-basis enterprise. Hired skippers and crew members are self employed, they own their share of the catch, and are responsible for their social security and unemployment taxes. As such, they are independent contractors, not employees, for purposes of taxes and benefits. The vessel owner is often absent during fishing operations. Therefore, it is unfair to give vessel owners a valuable harvesting right based on the crew's share of the

catch. A proposal to give crew members an initial allocation of QS based on their average share of the catch over the qualifying years was discounted by the Council as too complex, but without it the plan would concentrate 100 percent of the ownership of the resource in the hands of 20 percent of the work force that harvests it. Crew members would be prevented by the IFQ program from moving up in the profession, and may be prevented from finding any fishing job as the size of the fleet decreases. It would narrow the options for those who have participated as deckhands and boat operators. The IFQ plan would take away the livelihood of crew members, without compensation, so that others can have a more lucrative and convenient work environment, and hold an exclusive fishing right in perpetuity. This would violate the Magnuson Act.

Response: NOAA finds no violation of the Magnuson Act or the Halibut Act by implementing the allocation of fishing privileges as prescribed by those laws. The advantaging of one group to the detriment of another is inherent in an allocation and is consistent with the Magnuson Act and Halibut Act if certain criteria are satisfied (see discussion of national standard 4 and section 303(b)(6) above, and response to comment 11). The Council considered allocating QS to crew

members but decided against it because of the practical difficulties of documenting crew shares. Instead, the Council decided to give eligibility for initial allocations only to vessel owners and lease holders because they have a capital investment in the vessel and gear that continues as a cost after crew and vessel shares are paid from a fishing trip. However, the IFQ system does not ignore crew members or prevent them from "moving up" in the fishing profession or continuing to find crewing positions. Skilled crew members should be more in demand under the IFQ program if they can contribute to the value of the fish products and lower costs of fishing. Crew members who purchase QS also will be in demand for the added harvesting potential they will bring to a vessel. The IFQ program provides for enhanced safety for crew members who work in one of the most hazardous work environments. For these reasons, professional fishing vessel crews in the halibut and sablefish fisheries are expected to be better off under the IFQ program than under open access management. Finally, the IFQ program does not grant anyone an exclusive fishing right "in perpetuity." Although the IFQ program is expected to continue indefinitely, it is subject to refinement, amendment, or even repeal as a result of subsequent decisions by the

Council, the Secretary, and the U.S. Congress.

Comment 14: The definition of "IFQ crew member" precludes individuals who do not receive an initial allocation of QS from acquiring catcher vessel QS in the future. This is because the word "and" would require both conditions, experience and an initial allocation, to be met before receiving a transfer of QS. In addition, the definition creates a special class of U.S. citizens that has exclusive access to the halibut resources. This definition is not fair and equitable to all U.S. fishermen and consequently violates national standard 4.

Response: NOAA agrees that the word "and" in the proposed definition of "IFQ crew member" at § 676.11 is too restrictive because it would prevent entry of new fishermen into the halibut and sablefish fisheries. In this action "and" is replaced by "or." This change clarifies that both conditions, experience and receipt of an initial allocation, are not necessary to qualify as an IFQ crew member, but either condition will suffice. Although the definition does create a "special class," it is not a closed class since any person with at least 150 days experience working as part of the harvesting crew in any

U.S. fishery could qualify for catcher vessel QS, even though that person did not receive an initial allocation. The Council determined that only IFQ crew members should be able to acquire and use catcher vessel QS as a means of fostering professionalism in the catcher vessel fleet. Professionalism developed from commercial fishing experience also is likely to enhance vessel safety. Therefore, NOAA finds no violation of national standard 4 (see discussion of "fair and equitable" in response to comments 11 and 13).

Comment 15: The proposed regulations would violate Federal tax law because vessel owners are assumed to be "employers" and deckhands "employees."

Response: No such assumption is made. Vessel owners and lease holders are eligible for an initial allocation of QS and crew members are not eligible primarily because vessel owners and lease holders generally have a greater investment in the fisheries than do the crew members. The commenter does not specify how this allocation violates tax laws. NOAA finds no violation of U.S. tax laws on this point.

Comment 16: The IFQ system would be extremely detrimental to Alaskans residing in coastal communities. The

halibut fishery is characterized by a large diversified fleet of relatively small vessels that are based in, and deliver their catch to, numerous ports within Alaska. Alaskan coastal communities [*59387] are economically dependent on this large fleet of small family-owned fishing vessels. The IFQ program would destroy the small-scale family fishing business in Alaska the same way big agribusiness is forcing the small family farms out of business. It would undermine the economic base of most of Alaskan coastal communities, deny access to citizens who live closest to the fishery resources, and put thousands of fishermen and shore plant workers along the Alaskan (Gulf) coast out of work. Seldovia will be finished as a fishing port if halibut and sablefish can't be landed there. Many years ago, the fleet was smaller and comprised of larger vessels based predominantly in the State of Washington. The IFQ plan is an attempt to tear the social fabric of Alaskan coastal communities and make the present culture fit the memories of the former fleet owners. Potential impacts of the IFQ plan on Alaska coastal communities involved in these fisheries dictate a need to do additional detailed studies before the plan goes into effect.

Response: The IFQ program is intended to achieve OY by resolving 10 conservation and management problems identified by the Council in 1989. Although the program will limit access to these fisheries, the Council incorporated measures to prevent undue disruption of the economic and social structure of Alaskan coastal communities. Landings of halibut and sablefish under the IFQ program can be made at any port. There is no requirement (except in § 676.14(e) pertaining to transshipment of processed IFQ fish) that prevents landing these species at Seldovia or any other port in or outside of Alaska. The potential effects of the IFQ program and alternatives were studied and taken into consideration by the Council and the Secretary. Social and cultural aspects of the halibut and sablefish fixed gear fisheries are considered and described in several sections of the FEIS. Most notably, the analysis of July 19, 1991, focused on the halibut fishery. Section 5.0 of that document was prepared by a social anthropologist and contained a detailed description of the social environment of the halibut fishery including present participation from coastal areas, historical fishing practices and dependence on the fishery by coastal communities, and details of native and subsistence fisheries. Specific demographic profiles of affected

coastal communities are provided which address the relative economic importance of the halibut fishery to each community and the size, composition, and stability of the resident work force relative to the fishery. The section concludes with an assessment that social and cultural benefits could be maximized under an IFQ program. Another one of the component analyses of the FEIS, dated March 27, 1992, also contains a section (3.0) devoted to assessment of potential coastal community impacts. This section describes the distribution of historical landings of halibut and sablefish relative to the distribution of harvesting privileges resulting from the IFQ program and the importance of these landings to each community relative to other species. This section also assesses the potential for QS to be transferred away from coastal communities. The assessment concludes that some net transfer of QS is likely to occur, but that overall, the IFQ program is expected to provide net benefits to rural coastal communities,.Alaska, and the Nation (FEIS sec. 3.4). At the request of the Governor of Alaska, the Alaska Commercial Fisheries Entry Commission conducted an independent review of the IFQ program. That review concluded that fears of social disruption under the IFQ program are unfounded, and that rural coastal communities in Alaska are likely to

realize benefits from the program. Additional social and economic analysis are not likely to substantially add to the understanding of the effects of this IFQ program on Alaska coastal communities. However, NOAA favors continued monitoring and analysis of the effects of the IFQ program during its implementation. Unanticipated injurious effects may be addressed by amending the IFQ program if necessary.

Comment 17: The IFQ program would give a disproportionate share of the resource to "non-Alaskan" fishermen precluding participation by the growing Alaska longline fleet. This will deny residents of Alaska communities the opportunity to fully diversify and develop their fisheries, creating financial hardship and adverse economic impacts.

Response: The IFQ program will distribute harvesting privileges among fishermen (vessel owners/lease holders) in proportion to their history of landings during the base period (1984-1990 for halibut and 1985-1990 for sablefish). In some areas, the amount of QS initially allocated to residents of Alaska will be larger than those to residents of other states, and in other areas the reverse will be true. Tables 1-4 in Appendix D to the FEIS dated September 15, 1992, quantitatively

indicate the amounts of these proportions. For example, about 42 percent of the QS allocations for sablefish in the Aleutian Islands subarea will go to residents of Alaska while 58 percent will go to residents of other states (Table 2). On the other hand, about 88 percent of the QS allocations for halibut in area 2C will go to Alaska residents, and only 12 percent will go to residents of other states (Table 1). This allocation reflects present participation in, and dependence on, the halibut and sablefish fisheries by species and area. Under this allocation scheme, residents from all states have an equal opportunity to diversify and develop their fisheries for halibut and sablefish.

Comment 18: The IFQ program could provide for more development of offshore processors which will reduce the raw fish tax revenues to Alaskan communities.

Response: Significant growth in offshore processing of halibut and sablefish is unlikely because catcher vessel QS cannot be transferred to freezer vessels. If any catcher vessel QS are used on a freezer vessel during a fishing trip, then all fish onboard during that trip must be unprocessed (§ 676.22(i)(3)). Conversely, Alaska raw fish tax revenue may increase under the IFQ program if the landed value of

halibut and sablefish increases as expected.

Comment 19: Alaskan native people have not been able to fully develop their fisheries. Therefore, the Seldovia Village Tribe should be able to participate in the CDQ program. There is no reason for the CDQ program to be limited to western Alaska and prohibit natives along the central gulf coast from participating.

Response: The CDQ program is limited to western Alaska communities because the Council concluded that commercial marine fisheries could be developed in this area to the economic benefit of the participating communities and that commercial fisheries in these communities were undeveloped relative to other coastal communities in the State. A native organization in other parts of the State could acquire QS for use by its members. Catcher vessel QS used in this manner would have to be transferred to individuals.. Current QS use limitations at § 676.22 (e) and (f), and the QS holder-on-board requirement at § 676.22 (c) and (i) would limit the manner in which QS held by native organizations is used. Nevertheless, the IFQ program could be used to facilitate development of Alaska native fisheries outside of the CDQ program.

Comment 20: The IFQ plan would deny the Huna Tlingit people of southeast Alaska the right to make a living by fishing as they have done for [*59388] many generations and will force more of them on welfare. These native Alaskans will not be able to compete with better financed fishermen for the purchase of QS.

Response: The IFQ program will not deny any native group participation and could be used to help develop native fisheries (see response to comment 19).

Comment 21: The IFQ proposal effectively locks out women and minorities from participation in the IFQ fisheries and locks in the white male club of vessel owners by effectively giving them ownership of the resource. The price of buying IFQs will be prohibitive for minority deckhands who have recently entered these fisheries although they are granted free to vessel owners. Therefore, the IFQ plan would violate the Alaska State Constitution, the U.S. Constitution, and the Magnuson Act.

Response: NOAA finds no violation of the Magnuson Act, the Halibut Act, or other applicable law, including any state constitution or the U.S. Constitution.

There is no evidence in the record of discrimination against women or minorities. Although the cost of entering the IFQ fisheries by buying QS will be higher under the program than under open access management, the analysis demonstrates that implementation of the IFQ program will result in a net benefit to the United States. However, crew members may continue to work as crew members under the IFQ program with no obligation to purchase any QS.

Comment 22: The Council did not consider alternative management methods or alternative limited access methods other than IFQ variations after the 1989 draft SEIS for sablefish. Changed conditions in the fishery and socio-cultural environment require a new EIS before such a major Federal action could take place.

Response: The November 1989 analysis considered four alternatives for the fixed gear sablefish fishery: (1) Continued open access; (2) license limitation; (3) IFQ; and (4) annual fishing allotments. Based on this analysis, the Council determined that license limitation and annual fishing allotments were not reasonable alternatives for addressing the 10 problems identified by the Council. The Council then proceeded with a more

in-depth analysis of various IFQ options as compared with the open access or status quo alternative. The same conservation and management problems identified in the sablefish fishery also are experienced in the halibut fishery. The Council decided to consider only IFQ alternatives as compared with the status quo for the halibut fishery because it already had determined that license limitation and annual fishing allotments would not be feasible. In addition to the November 1989 analysis, FEIS component analyses in July 1991 and March 1992 included detailed descriptions of the social, cultural, and economic conditions of the fisheries. These conditions have not changed substantially since 1992.

Comment 23: Traditional management proposals have not been sufficiently considered as alternatives to the IFQ plan. There are simpler solutions to management problems in the halibut fishery (e.g., area registration, gear restrictions, quotas based on boat size, trip limits). that will allow everyone to participate in the fisheries. Other options for spreading out the fleet, such as trip limits, gear restrictions, and fleet platooning, should be considered first.

Response: The Council considered such traditional open-access management

measures as alternatives to the IFQ program, but concluded that these measures did not offer long-term solutions to the conservation and management problems confronting these fisheries. For example, none of the measures cited by the commenter would resolve the fundamental problem of excessive fishing capacity in the halibut and sablefish fisheries.

Comment 24: Fishermen need to diversify their fishing practices to survive the current depressed market prices for salmon. The IFQ program will prevent diversification.

Response: NOAA understands that recent low market prices for salmon have been hurting the salmon fishery in Alaska. The solution to this problem may be in creating more market alternatives for salmon products rather than providing opportunity for salmon fishermen to enter already overcapitalized fisheries. Nevertheless, diversification into several different fisheries likely will remain as a common practice. The IFQ program does not prevent diversification. Fixed gear fishermen who have IFQ will be able to realize benefits from being able to land their incidental catches of halibut or sablefish instead of discarding these species. However, those fixed gear fishermen who do not have IFQ

will not be allowed to harvest halibut and sablefish.

Comment 25: In its analysis, the Council makes few positive assertions in support of anticipated benefits; numerous caveats lead one to question whether there will be any real net benefits.

Response: No analysis is able to forecast future events with absolute certainty. The FEIS does not attempt to make such a forecast, but instead documents that certain potential effects may occur if the assumptions used in the analysis are correct.

Analysts typically caution the reader about the results and conclusions because the assumptions eventually may not be correct. This inability to have perfect knowledge of the future does not make the analysis invalid.

Comment 26: The IFQ program violates the Magnuson Act because it fails to achieve OY. .

Response: As discussed above, the OY from the fixed gear fisheries for sablefish and halibut is achieved through the reduction of bycatch and discard waste of fish, increased prevention of overfishing, and enhanced economic and social benefits to the Nation (FEIS sec.

6.0). Despite the fact that the IFQ program does not change the specified amount of fish that may be harvested each year, benefits to the Nation from harvesting that amount of fish are increased.

Comment 27: Procedural errors were made that confused and shortened the public comment period. Notice of availability of the supplemental EIS for comment at the Council level incorrectly advised the public that the time for addressing comments to the Council had expired before the documents were officially released. Further, Magnuson Act procedure was violated by not providing a full 45 days for public comment from the date of publication of the proposed rule notice. The Secretary did not make the plan amendments available to the public on the receipt date; Council staff did not release them until November 18, 1992. Allowing 60 days for public comment should have resulted in a comment deadline of January 18, 1993, not January 11, 1993. Generally, notices and deadlines for public comment and public testimony opportunities occurred during openings for the sablefish and halibut fisheries which prevented many people who would be affected by the proposal from fully participating in the policy-making process.

Response: Three different documents were available for public comments at different times during the development and Secretarial review of the IFQ program. These include the draft and final EIS, the FMP amendment text, and the proposed implementing rules. NOAA finds no errors with respect to providing sufficient opportunity for public comment on any of these documents (see response to comment 43).

Comment 28: National standard 4 of the Magnuson Act and the substantially [*59389] similar provisions of the Halibut Act are violated because the IFQ program is not reasonably calculated to promote conservation. As a biological conservation measure, quota share programs have proven ineffective and, in some cases, counterproductive. There will be increased pressure on managers to keep total catch limits high so that persons vested with harvesting rights will be able to pay off the debt of acquiring QS. Less efficient fishermen who retire from the halibut and sablefish fisheries will increase pressure on other fish stocks still under open access management. The potential biological harm from temporarily suspending halibut prohibited species catch (PSC) limits, under reporting, discards, and highgrading are

not fully assessed and could negate any conservation benefits.

Response: The promotion of biological conservation under the IFQ program should be considered in comparison with biological conservation under current open access management. Under the current regime, fishermen are inspired to maximize their harvest of halibut or sablefish as fast as possible before fishery managers close the open fishing season. Large amounts of fish may be killed but not harvested in this race due to lost or excessive amounts of fishing gear that is set but not retrieved. More halibut and sablefish are wasted when they are caught incidental to the harvest of other species but must be discarded because the season for halibut and sablefish is closed. In addition, harvested halibut must occasionally be returned to the sea because they have been mishandled and are rejected by processors as inferior product. These sources of fishing mortality are often not quantified or counted toward the overall catch quota but may have a negative effect on stocks.

The IFQ program will significantly reduce these sources of fishing mortality because fishing will be conducted over a longer period with less waste. Fishermen will have no incentive to set more gear

than they can retrieve, and fewer gear conflicts will result in less lost fishing gear. Halibut and sablefish caught incidental to the harvest of other species may be landed on unused IFQ. Discarded bycatch of IFQ species caught with fixed gear will be minimized because of the economic incentive to acquire IFQ at least sufficient to cover its retention and landing. Fishermen seeking the highest value for their product will take more time to properly clean and store fish on ice or process it immediately.

The potential for underreporting of IFQ harvests and highgrading are often cited as biologically detrimental aspects of IFQ-style management programs. Underreporting and highgrading are discussed in detail in the FEIS at Appendix E (pp. 2-7). NOAA recognizes that underreporting will not be completely prevented, but a planned increased enforcement and monitoring effort coupled with severe penalties for gross underreporting is likely to minimize this potential source of biological damage to the stocks. Highgrading, the substitution of large high-valued fish for harvested small low-valued fish, is not expected to be a major threat because of increased enforcement and because a relatively small market price difference between

small and large fish will reduce the profitability of highgrading and, therefore, the incentive to discard harvested fish. Generally, NOAA expects substantially less unreported fishing mortality under the IFQ program than under open access management.

Comment 29: The vast majority of technical comments and public opinions expressed to the Council were ignored by the Council. Something is wrong (with the IFQ program) when 75 to 85 percent of all responses are opposed to it. The IFQ program will not result in a better managed fishery and safer fishing conditions. It is advocated by a group of greedy individuals so that they can control a fishery that belongs to all the people. There have always been too many fishermen chasing too few fish. Sometimes this results in hurting the resource, but this is not the case with halibut which has been well managed.

Response: Over the 3 years that the Council had the IFQ program under consideration, it received thousands of oral and written comments that expressed support or opposition. The Secretary also received many pro and con comments on the IFQ issue before and during the Secretarial review period. The Council also received reports and advice from its industry advisory panel and scientific

and statistical committee, and reviewed analyses and staff reports on the potential effects of the IFQ program as compared with the open access and other alternatives. After considering all of these comments, reports, recommendations, and analyses, the Council concluded that the IFQ program would result in better management of the fisheries and benefits to the Nation. The Secretary, after reviewing the record of comments, reports and analyses, agreed with the Council and approved the Council's IFQ recommendation.

Comment 30: Reducing the number of vessels in the fishery will not necessarily increase the length of fishing seasons since 20 percent of the vessels take 85 percent of the fish. If the bottom 80 percent of the fleet leaves the fishery there would be only a minimal increase in the length of openings.

Response: The IFQ program allows an IFQ permit holder to harvest halibut and sablefish at any time during the season prescribed at § 676.23. This is true regardless of the number of vessels in the fleet. No specific fleet size or reduction goal is established by the IFQ program. Instead, fishermen who have QS will harvest IFQ fish with fixed gear at various times of the year based on their

assessment of the market for those species and other factors.

Comment 31: Four different sets of public comments (3 to the Council and 1 to the Governor of Alaska) indicate strong opposition to the IFQ plan from Alaskan residents and support from non-Alaska residents. Opposition comments from Alaskan addresses ranged between 59 percent and 98 percent of all comments received while supportive comments from non-Alaskan addresses ranged between 70 percent and 96 percent. This suggests that the plan discriminates between residents of different states in violation of national standard 4.

Response: These statistics do not indicate discrimination prohibited by national standard 4. State of residence is not a factor for the allocation of QS. Similarly situated residents of all states are treated equally under the IFQ program.

Comment 32: The proposed rule would exceed the permitting authority allowed by the Magnuson Act. The proposed rule provides for IFQ permits to be issued to persons, but the Magnuson Act allows permitting only of vessels or the operators of vessels. "Persons" are not vessels and they are not required to be operators of vessels.

Response: The Magnuson Act, at section 303(b)(10), provides authority to prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery. NOAA has determined that IFQ permits may be issued to owners of vessels as opposed to operators of vessels.

Comment 33: The proposed rule would violate the U.S. Constitution at Article I, section 9, paragraph 6 because it would require vessels bound for another state to enter and clear at one of several ports in Alaska. [*59390]

Response: This clause of the U.S. Constitution is as follows:

No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

NOAA has modified the regulation by including the port of Bellingham, Washington, as a designated port. Thus, vessels bound for Washington are not "obliged to enter, clear, or pay duties

in another state." Vessels bound for states other than Alaska or Washington should contact the NOAA Office of Enforcement to make other arrangements (see response to comment 49).

Comment 34: Transfers of QS by inheritance are of limited use if the person who inherits it does not also receive IFQ based on the QS, according to §§ 676.21 and 676.22. This is tantamount to inheriting a home and being prevented from using it to live in, to rent, or for other purpose except to sell it to a restricted class of persons. This would be an unfair restriction on the use of personal property.

Response: All transfers of QS must be approved by the Regional Director according to the procedure prescribed at § 676.21(e) before they can be used to harvest IFQ fish. This provision is necessary to assure that QS use limitations and other requirements of the Council's IFQ policy are not violated. The regulations do not prevent the transfer of QS by operation of law, but the use of such QS through the annual allocation of IFQ must be consistent with the regulatory requirements to achieve the conservation and management objectives of the IFQ program. The personal property nature of QS and IFQ is addressed in the response to comment 91.

Comment 35: The IFQ plan will add costs to the halibut fishery that will hurt the international competitiveness of American-caught fish.

Response: The IFQ program will likely add value to halibut products because catching and processing will proceed at a more deliberate pace than under the current 1-day seasons. In addition, a longer season for halibut under the IFQ program will enable the marketing of higher valued fresh fish over a longer, more predictable period of the year. These features should enhance the competitiveness of halibut harvested in and off of Alaska in domestic and international markets (FEIS sec. 2.2.2).

Comment 36: The conflict of interest by several Council members who voted on the IFQ issue questions the legal authority of the Council. The composition of the Council is not fair and balanced as required by the Magnuson Act.

Response: The Council is legally constituted under the Magnuson Act. Section 302(b) of the Magnuson Act authorizes the appointment of voting members who are knowledgeable of the fisheries of concern to the Council by virtue of their occupation, training, or expertise.

Comment 37: NMFS does not have adequate funding to enforce the IFQ plan. The cost of providing minimum enforcement of the program will be significantly more than the present cost of enforcing traditional management measures for the halibut and sablefish fisheries. The Council did not make an informed decision regarding the enforcement costs of the IFQ program because neither the Council nor the public had an adequate analysis of enforcement costs.

Response: NOAA estimates that administrative and enforcement costs will be increased by about $ 2.7 million annually, and there will be an additional 1-time implementation cost of about $ 1.9 million (FEIS sec. 6.1). The Council was aware of these approximate costs when it decided to recommend the IFQ program to the Secretary. An implementation plan was prepared by NMFS, in consultation with an interagency and industry work group, for presentation to the Council at its December 1991 meeting prior to the Council decision on IFQ management. The implementation plan is section 5.0 of the FEIS. Monitoring and enforcement issues are discussed in that plan, and costs are estimated. This was the best information available to NMFS and the Council on implementation costs at that time. In approving the IFQ program, the Secretary

accepted the responsibility to carry it out.

Comment 38: Analysis of the overall administration of the IFQ program was inadequate. NOAA did not develop an adequate explanation of the appeals process, application and initial allocation process, or the general complexity and cost of the bureaucracy needed to administer the IFQ program. The Council did not have an adequate analysis of the administrative and enforcement costs or of comparable implementation costs of alternatives to the IFQ program.

Response: A group of state and Federal fishery managers, enforcement personnel, and representatives of the fixed gear fishing industry met several times during the period September-November 1991, to discuss the details of IFQ implementation, if it were approved by the Council and Secretary. An implementation plan, drafted by NMFS, was the product of that group. The implementation plan was presented to the Council at its December 1991 meeting prior to the Council's decision to recommend the IFQ program to the Secretary. The group also made recommendations to the Council on ways to make the IFQ program more practicable. The implementation plan is contained in

section 5.0 of the FEIS. Such plans are not required under the Magnuson Act or any other law, and are not usually submitted with FMP amendment documents for Secretarial review. However, the implementation plan was helpful to the Council and the Secretary in indicating the potential administrative complexity and cost of the IFQ program before they took final action. To this extent, NOAA finds that the implementation plan is an adequate description of the overall administrative process. The appeals process is discussed in the plan (FEIS sec. 5.2.5). Regulations implementing the appeals procedure will be the subject of a future rulemaking notice. However, paragraph (e) of § 676.20 provides guidance for appeal of initial allocations and is changed from the proposed rule in that there will be no resubmitted applications.

Comment 39: NOAA did not provide the Council or the public with relevant information regarding the effectiveness of administration and enforcement of the surf clam/ocean quahog ITQ program. A memorandum on this subject was produced in February 1992 which would have been useful to the Council staff in the preparation of its analysis dated March 27, 1992, and to the public in commenting to the Council prior to its

reconsideration of the IFQ program in April 1992.

Response: The surf clam/ocean quahog ITQ program review performed by the Northeast Region, NMFS, early in 1992 was of little relevance to the halibut and sablefish IFQ program. The two programs are significantly different in design and administration. These differences stem from major differences between the respective fisheries. A comparative analysis is outside the scope of this response; however, interested persons are referred to proposed and final rule notices published respectively on February 1, 1990; 45 FR 53342, and June 14, 1990, at 55 FR 24184.

Comment 40: The Council is not clear about its goals for the IFQ program. Apparently, the Council is not totally satisfied with the potential socio-economic impacts of the program [*59391] because it began work on amending the program before the program completed Secretarial review.

Response: The Council's objectives are clearly specified in the November 1989 analysis. In that document, and in subsequent documents (most recently at FEIS sec. 2.1), the Council identifies 10 conservation and management problems in the fixed gear fisheries for halibut and

sablefish. NOAA expects any complex fishery management program to undergo periodic review and change as experience with the IFQ program suggests refinements. The fact that such refinements were not known at the beginning of the planning process does not indicate confusion regarding goals and objectives.

Comment 41: The Council failed to provide the public with an adequate and complete analysis of the benefits and costs of the IFQ program and of its potential social impacts. A social impact assessment would have demonstrated significant negative social impacts on Alaskan coastal communities from the IFQ program.

Response: The FEIS analyses prepared by the Council fully assess the potential benefits and costs of the IFQ program and its potential social impacts. A summary of the potential benefits and costs is in FEIS section 6.0, which estimates quantified annual benefits to be in the range of $ 30.1 million to $ 67.6 million. Quantified annual costs for administration are estimated to be about $ 2.7 million. This results in a conservative benefit-cost ratio of about 10 to 1. Non-quantified benefits and costs also are discussed. NOAA finds that the analysis of benefits and costs in the

FEIS is adequate. Significant negative social impacts on Alaskan coastal communities are doubtful (see responses to comments 5, 16, and 17).

Comment 42: The Assistant Administrator for Fisheries, NOAA, is incorrect in his initial determination that the IFQ proposal is not a major rule under Executive Order 12291. The total estimated annual benefits (sic) are in excess of $ 100 million, and a regulatory impact analysis should be prepared.

Response: Executive Order 12291 requires the preparation of a regulatory impact analysis for "major rules." Among the criteria for determining whether a rule is a "major rule" is its likelihood of resulting in an annual effect on the economy of $ 100 millon or more. An RIR was done as part of the FEIS and it is summarized in section 6.0 of the FEIS. The RIR concludes that the IFQ program would have an effect on costs, prices, competition, employment, investment, and productivity, but that it is anticipated that these effects combined would not amount to $ 100 million or more annually. The RIR estimates that quantifiable annual benefits would be in the range of $ 30.1 million to $ 67.6 million. Annual administrative and enforcement costs are estimated to be about $ 2.7 million with an additional one-time implementation

cost of about $ 1.9 million. Therefore, NOAA determined that this is not a "major rule."

Comment 43: The public comment period should be extended to allow for adequate public review.

Response: As described in the preamble to the proposed rule, the Council has discussed limited entry options for various fisheries since the late 1970s and, for the sablefish fishery in particular, since 1985. Through April 1992, the issue of limited entry for the sablefish or halibut fisheries has been on the Council agenda for 27 meetings, and every meeting of 1988 through April 1992. All Council and committee meetings at which this subject was discussed were publicized, open to the public, and most provided opportunity for public comment. In addition, the Council chose to follow a full EIS-procedure under the National Environmental Policy Act (NEPA) for this issue, in part to enhance opportunity for public participation. This procedure provided for public scoping meetings and comment periods on several draft analyses and the FEIS. After receipt of the proposed IFQ program by the Secretary, a notice of availability was published on November 3, 1992 (57 FR 49676), and the proposed implementing rule was published on December 3, 1992 (57 FR 57130;

corrected at 57 FR 61870, December 29, 1992). The comment period ended on January 11, 1993, which provided sufficient time for public review and comment. NOAA concludes that the opportunity for public review and participation in the IFQ decision-making process was adequate in light of extensive public discussion of this issue at Council meetings and compliance with requirements of the Magnuson Act and other applicable laws (see response to comment 27).

Comment 44: The proposed IFQ plan is not consistent with several sections of the Magnuson Act. Specifically, the plan violates several national standards (section 301), it does not include an adequate fishery impact statement in violation of section 303(a)(9), and it does not properly address the provisions of section 303(b)(6).

Response: Section 7.0 of the FEIS provides a summary of consistency with the Magnuson Act and other applicable laws. Consistency with each national standard is addressed in this section and above in this rule. Magnuson Act section 303(b)(6) requirements are addressed in section 7.1.2 of the FEIS and above in this rule. The primary focus of the analysis in the FEIS is the potential effect of the IFQ program (and

alternatives) on participants in the halibut and sablefish fisheries in compliance with the fishery impact statement requirement of the Magnuson Act at section 303(a)(9). Section 4.0 of the FEIS assesses the possible effects on non-IFQ fisheries, recreational fisheries, and fisheries in areas managed by adjacent Regional Councils. After reviewing these documents, NOAA determined that the IFQ program complies with the Magnuson Act and other applicable laws.

Comment 45: The proposed rule at § 676.16(h) (formerly § 676.16(g)) would prohibit the discard of Pacific cod and rockfish taken by vessels in the IFQ program. This requirement could cause a biological conservation problem because the bycatch allowances for rockfish are not high enough to prevent area quotas for some species of rockfish to be exceeded. The regulations should be changed to require the retention of only the natural or background bycatch of rockfish. Also, an overage provision for rockfish, similar to that for IFQ halibut, may be needed to avoid mandated waste.

Response: The prohibition on discarding Pacific cod or rockfish that are taken incidental to the harvest of IFQ halibut or sablefish applies only if

Pacific cod or rockfish are not otherwise required to be discarded by other State and Federal regulations or inseason orders (see response to comment 78(a)).

Comment 46: The proposed rule at § 676.17(b) would establish a system that makes IFQ holders accountable for small overages of IFQ. It is not clear, however, who would be accountable for overages of leased IFQ. Would the holder of QS on which the IFQ is based be penalized or the person who leased the IFQ?

Response: The Regional Director would deduct an amount equal to the overage from IFQ allocated in the year following determination of the overage. This overage adjustment will apply to any person to whom the affected IFQ is allocated in the year the adjustment is made. For example, fisherman A transfers sablefish IFQ to fishermen B in 1995 through an approved lease of QS. Fisherman B lands sablefish that year that exceeds the leased amount by 3 percent. If this fact is determined by the Regional Director in 1996, then the IFQ allocated to fisherman A in 1997 will be reduced by 3 percent, assuming he [*59392] made no other transfers of QS. If fisherman A sold all of his QS to fisherman C in 1996, then fisherman C would realize the reduced IFQ in 1997.

Comment 47: The halibut QS use limit and vessel limit in regulatory area 2C should be the same one-half percent of the total halibut QS for that area. The proposed rule (at § 676.22(f)(1)) would establish the personal use limit at one percent and the vessel limit at one-half percent (§ 676.22 (h)(1)).

Response: NOAA agrees that the halibut QS use limit in area 2C by a person and the vessel harvest limit should be consistent. A 1 percent harvest limit per vessel in area 2C also is consistent with the text of the Council's IFQ motion, which indicates that the one-half percent limit expressed in the proposed rule was in error. Therefore, in § 676.22(h)(1), the harvest limit of IFQ halibut applicable to vessels in area 2C is changed from 0.5 to 1 percent of the total halibut catch limit for that area.

In addition, to further clarify the restrictions under paragraph (h), language has been added to paragraph (h)(3) stating that two or more persons may not catch and retain their IFQs with one vessel in excess of these limitations.

Comment 48: An exception to the requirement for catcher vessel QS holders to be onboard the vessel during fishing operations is provided at § 676.22(i)(1)

to individuals who receive an initial allocation of catcher vessel QS. This contradicts the Council's stated goal of maintaining the current owner-operator character of the halibut and sablefish fleets. Although this exception does not apply to the eastern GOA, in other areas it would allow initial QS recipients to hire skippers and function as absentee-owners. This is not consistent with the Council's policy.

Response: The Council's basic policy is to require catcher vessel QS holders to be onboard during fishing operations and sign required landing reports. The Council provided for an exception to this policy in its motion language and FMP amendment text for persons who receive initial catcher vessel QS for use outside the two areas described in the responses to comments 60 and 68. As defined, "persons" includes individuals, corporations, partnerships, and other entities. Therefore, the exception, as it applies to individuals, is at § 676.22(i)(1), and at § 676.22(j)(1) as it applies to corporations and partnerships. This policy responds to public concern about substantial change in the current owner-operator character of the fixed gear fishery and the fear that large firms that use hired skippers may acquire catcher vessel QS. However, many individual fishermen operate their

vessels as corporations or partnerships for financial, liability, and taxation reasons. The exception is intended to prevent severe disruption of current fishing practices. The Council was aware that such an exception deviated from its basic policy by allowing hired masters to operate vessels that use catcher vessel QS. It is not expected to allow for unintended changes in the character of the fleet because the exception is not transferrable, and it expires when corporations or partnerships undergo a "change." The term "change" is defined at § 676.22(j)(2). Eventually, as the individuals and firms that received initial allocations are replaced by new ones, all catcher vessel QS will be transferred to individuals in keeping with the Council's basic policy.

Comment 49: The list of primary ports in § 676.17(a)(4) should be expanded to include the Washington ports of Bellingham and Seattle. A large segment of the halibut fleet is based in the State of Washington and has a long history of delivering products to these ports.

Response: NOAA agrees. Bellingham, Washington, has been designated a primary port. Vessels bound for Washington or other States must submit a check-out report to NMFS before departing waters in

or adjacent to the State of Alaska. The check-out report must include the estimated weight of IFQ sablefish and IFQ halibut onboard, and the expected date and time that the vessel will be presented to NMFS enforcement officers or enforcement aides in Bellingham for clearance. Bellingham is selected because of its high volume of halibut landings and its proximity to the U.S./Canada border.

Comment 50: Would a catcher-processor be allowed to process at sea halibut or sablefish that are harvested under the vessel's IFQ or purchased from other catcher vessels?

Response: A vessel that is used to process some or all of its catch during any fishing trip is defined as a "freezer vessel" in § 676.11. A catcher-processor would be allowed to process at sea IFQ halibut or IFQ sablefish providing the vessel harvested these fish against QS assigned to vessel category "A" (the freezer vessel category). Although IFQ halibut could be processed by freezing and removing the head, it could not be otherwise disfigured in a manner that prevents determination of the minimum size (see § 301.12).

The transfer of any IFQ species from the vessel that harvested such fish is

defined as an "IFQ landing." A landing of IFQ species to any vessel would require that the receiving vessel have a permitted registered buyer onboard and be capable of transmitting the IFQ landing report required at § 676.14(b). A minimum of 6 hours prior notice must be given by the operator of the vessel making an IFQ landing (see § 676.14(a)). In addition, the vessel making the landing may be required to obtain a clearance at a primary port listed in § 676.17(a) prior to landing, depending on the location of the vessel to which IFQ species will be landed. Hence, if a catcher vessel making an IFQ landing and a catcher-processor which received the landing comply with these and other applicable laws, then the catcher-processor would be allowed to process the landed IFQ species.

Comment 51: The application for an initial allocation of QS should be announced in industry publications in addition to the Federal Register. Federal Register publications are the most cumbersome and confusing forms of communication on earth. In addition, a 180-day application period may not be long enough if it coincides with the primary fishing period of April through September.

Response: Although official notice of the QS application period will be given

in the Federal Register, NOAA will alert the fishing industry through more widely read publications and news announcements. In addition, NOAA will schedule the application period, at least in part, during fall or winter months when most of the fixed gear fishing fleet is not active.

Comment 52: Restrictions on leasing QS at § 676.21(d) are necessary to prevent absentee QS holders, to keep QS in the hands of active fishermen, and to prevent a stagnant market for QS that could result in prohibitively high costs for entry. For these reasons, there should be no provision (§ 676.21(f)) to allow leasing 10 percent of a QS.

Response: The Council heard the arguments for and against leasing QS. The Council decided to recommend no restriction on leasing freezer vessel QS but to prohibit leasing of catcher vessel QS except during a 3-year trial period when up to 10 percent of a person's catcher vessel QS may be leased. The limited leasing of catcher vessel QS was intended by the Council to allow fishermen more flexibility in planning their fishing operations and was not expected to result in abandonment of the fishery to absentee QS holders. In its review of the Council recommendations on leasing QS, NOAA found no inconsistency

with the Magnuson Act, Halibut Act, or other applicable laws.

Comment 53: Requiring catcher vessel QS holders to be onboard is an important provision necessary to ensure [*59393] that QS stay in the hands of active fishermen. Temporary exceptions to this rule for extreme personal injury should be stringent to prevent QS holders using this provision to get around the leasing prohibition.

Response: Emergency waiver of requirements for an individual IFQ card holder to be onboard during fishing operations and sign the IFQ landing report is provided at § 676.22(d). These requirements may be waived only for the IFQ halibut and IFQ sablefish retained on the fishing trip during which an extreme personal emergency occurred that prevented the IFQ card holder from complying with § 676.22(c). Use of IFQ held by an injured or deceased IFQ permit/card holder on subsequent fishing trips would require transfer approval as prescribed at § 676.21(e).

Comment 54: What happens to a person's QS when they die? Can it be leased while their estate is being resolved or temporarily used by an heir? At what age may a person take on the responsibility of owning QS?

Response: When a QS holder dies, that person's QS would be transferred by the laws of succession. Notification of such transfers by operation of law would have to be sent to the Regional Director as prescribed at § 676.21. After determining that a person is the lawful holder of QS received by operation of law, that person may subsequently seek approval to use, lease, sell, or otherwise transfer QS within the limitations of the regulations. There is no provision for temporarily using QS before use, lease, or other subsequent transfer of the QS that was transferred by operation of law has been formally approved by the Regional Director. No age criteria are prescribed for receiving or using QS. Anyone capable of satisfying the QS-holder-on-board requirements for catcher vessel QS at § 676.22 (c) and (i) could use such QS.

Comment 55: The cost of the CDQ program to QS holders would be substantial because they would receive less QS than they otherwise would without the CDQ program. Any additional costs incurred to implement and administer the CDQ program should be borne only by the CDQ recipients.

Response: The Magnuson Act does not authorize charging CDQ program implementation costs to CDQ recipients.

Comment 56: The wording at § 676.20(a)(1)(iii) is vague regarding evidence of a verbal vessel lease which is common practice in the catcher vessel fleet. One recommended form of documenting such vessel leases is to determine who paid the crew members and, therefore, was responsible for issuing them their Federal income tax form 1099.

Response: NOAA agrees that language in the proposed paragraph regarding Federal income tax documents is vague, but limiting acceptable documentation to a specific tax form, such as Form 1099, does not improve the paragraph. Therefore, Federal income tax documents are deleted from § 676.20(a)(1)(iii) as acceptable evidence of a vessel lease, for purposes of initial allocation to vessel lease holders. This language was included in the proposed rule in response to fishing industry concerns about documenting the existence of a vessel lease. Some fishermen argued that vessel lease holders would be responsible for mailing IRS Form 1099 to the crew and that this would demonstrate the fact that persons issuing such forms were lease holders. This is a vague standard because persons hired by a vessel owner may

submit this form to the IRS on behalf of the vessel owner. The final rule deletes this evidence of a vessel lease. The option of an after-the-fact statement from the vessel owner and lease holder attesting to the existence of a lease remains for persons who did not have a written vessel lease agreement. Agreement should be reached between former vessel owners and lease holders to draft and sign such statements when there was no previous written lease.

Comment 57: The definition of "freezer vessel" should be based on the performance of a vessel during any fishing trip. This would allow freezer vessels to use catcher vessel QS for sablefish when they are not operating as freezer vessels.

Response: In § 676.11, "freezer vessel" is defined as any vessel that is used to process some or all of its catch during any fishing trip. Fishing "trip" also is defined in § 676.11. Hence, operating as a freezer vessel depends on how the vessel handles its catch during a fishing trip. Note, however, that a freezer vessel that operates as a catcher vessel during a trip for purposes of using sablefish catcher vessel QS, is still a "processor vessel" under §§ 672.2 and 675.2 because this definition depends on the capability of a vessel to process

groundfish regardless of whether it actually processes fish on any fishing trip (see also change 2 under "Changes from the Proposed Rule in the Final Rule" above).

Comment 58: The Council did not intend to allow catcher vessel IFQ for halibut to be used on freezer vessels. The provision at § 676.22(i)(3) to allow catcher vessel IFQ to be used on freezer vessels was intended to apply only to sablefish. A new prohibition should be added at § 676.16 to say it is unlawful to use halibut catcher vessel shares on a vessel which has, or will, during the current year of participation, operate as a freezer vessel.

Response: NOAA agrees that the IFQ motion approved by the Council specifically states that sablefish catcher vessel QS may be used on a freezer vessel providing no frozen product of any other species is onboard at the same time. The regulation at § 676.22(i)(3), more broadly allows for halibut catcher vessel QS to be used on a freezer vessel in the same manner. This allows for a bycatch of halibut on such vessels to be retained and landed in compliance with the requirement to land all fish unprocessed. The broader application of this regulation could reduce discard waste of halibut. This

interpretation of the Council's motion does not require vessels operating as freezer vessels to land halibut if they have catcher vessel halibut IFQ onboard. NOAA understands that the Council did not want to require vessels operating as freezer vessels to have IFQ for all of their halibut bycatch because this would create an economic incentive for freezer vessel owners to acquire catcher vessel QS. This is why the discard prohibition at § 676.16(l) is specific to catcher vessels. Finally, another part of the Council's motion states that "fish" harvested with catcher vessel QS may not be frozen onboard the vessel using those QS. The non-specific "fish" in this case indicated to NOAA that a broader interpretation of the provision to use catcher vessel IFQ on freezer vessels operating as catcher vessels would be consistent with Council intent while allowing for less discard waste of halibut.

Comment 59: Exactly what is "QS?" The preamble to the proposed rule suggests that QS is related to a person's catch history expressed in pounds, but the regulatory text implies that QS is a percentage.

Response: In § 676.11, "QS" is defined as a permit, the face amount of which is used as a basis for the annual

calculation of a person's IFQ. This is a change from the definition of QS in the proposed rule that stated it was an amount of sablefish or halibut. This change is made because the proposed rule incorrectly implies that QS is expressed in volumetric terms. However, the units of a QS permit are simply "QS." A QS is converted into pounds of IFQ in the annual IFQ calculation. A QS is based on qualifying poundage of halibut or sablefish plus or minus any transferred amounts. Qualifying poundage is calculated for each qualified person who harvested [*59394] either IFQ species with fixed gear while the person owned or leased the vessel that made the landings during the base period (1984-1990 for halibut and 1985-1990 for sablefish). This calculation is done separately for each regulatory area. For example, if a qualified person's highest total landings of halibut in area 2C during the halibut base period is 20,500 pounds, then that person would receive an initial allocation of 20,500 QS. If that person subsequently sells 3,250 QS and later purchases 5,000 QS, then that person would hold 22,250 QS of halibut in area 2C. The amount of IFQ that will stem from this QS in any year will depend on two other variables for this area, the QS pool and the catch limit for halibut prescribed by the IPHC. Although it is true that dividing any person's QS by the

QS pool for an area would result in a ratio, QS is not expressed as a percentage because the QS pool may vary from year to year. This is particularly likely as disputes over initial allocations of QS are resolved, but could continue thereafter as a result of enforcement actions that sanction QS. It would be difficult for fishermen to trade portions of a percentage that is annually changing. Expressing QS as a whole number should facilitate the transfer of QS as envisioned by the Council. The QS pool will be fixed each year on January 31 for purposes of calculating each IFQ for that year. Activity in transfers of QS and IFQ is expected to be heightened in January and February as fishermen plan their operations for the coming IFQ fishing season.

Comment 60: The definition of "IFQ crew member" at § 676.11 is limited to "individuals" and catcher vessel QS may be transferred only to IFQ crew members according to § 676.21(b). This would prevent corporate "persons" that receive an initial allocation of catcher vessel QS from acquiring more QS. This limitation was not intended by the Council. Also, the crew member definition should be more specific about experience in the harvesting of fish. Five months of experience as a marine engineer, cook, or processing crew member was not supposed

to qualify someone for "IFQ crew member" status.

Response: NOAA agrees that the proposed rule at § 676.21(b) was inconsistent with Council intent to allow "persons" that are not "individuals" to acquire catcher vessel QS if they received an initial allocation of catcher vessel QS. However, this intent does not apply in IFQ regulatory area 2C for halibut, nor does it apply east of 140 degrees west longitude for sablefish (see response to comment 68). Therefore, this paragraph is changed to add the provision that catcher vessel QS for use outside the regulatory areas specified above may be transferred to a person that received an initial allocation of catcher vessel QS. This change makes this paragraph more consistent with § 676.22(j) which provides for corporate "persons" that received an initial allocation of catcher vessel QS to acquire more QS for use outside the regulatory areas specified above in the name of the corporation or partnership instead of an individual. This change also clarifies the Council's intent to provide an exception to the basic requirement that such QS must be transferred to individuals as a protection against corporate buy out of catcher vessel QS. The definition of "IFQ crew member" at § 676.11 specifically states that experience must be as part of

the harvesting crew (see response to comment 79).

Comment 61: The proposed rule preamble text regarding the calculation of initial QS could be misinterpreted to mean that fishermen simply total the highest catches over 5 years and all areas. The Council intended that these calculations be area-specific.

Response: The proposed rule preamble states that "each initial QS calculation would be specific to a regulatory area for which a catch limit of halibut or fixed gear sablefish is specified" (57 FR 57134, column 2, line 23). Moreover, the regulatory text at § 676.20(b) clearly states that initial QS is calculated "in each regulatory area."

Comment 62: The proposed rule preamble and proposed regulations do not fully explain the vessel category assignments of QS. It should be made clear that the assignment scheme is based on the number of vessels on which landings of fixed gear groundfish and halibut were made during a person's most recent year of participation. Also, the rule should clarify vessel category assignments if landings were made in more than one vessel category during the most recent year of participation or if no sablefish or halibut were landed that year.

Response: The proposed rule preamble refers the reader to Figures 2a and 2b in section 5.0 of the FEIS. These figures graphically describe the decision process effecting vessel category assignments. This decision process is described in regulatory text at § 676.20(c). However, the proposed rule was not clear about the assignment of QS to vessel categories when two or more vessels in different categories would be assigned QS. It also neglected the possibility that none of a person's vessels harvested halibut or sablefish with fixed gear during the person's most recent year of participation. Therefore, this section is changed as follows: First, the definition of "participation" that was at paragraph (8) is moved to the introductory text of paragraph (c) and revised to define "the most recent year of participation." Second, the text of paragraphs (6), (7), and (8) is changed, and a new paragraph (9) is added, to clarify that vessel category is not a factor in determining whether a person qualifies for QS. Instead, the assignment of QS is made to a vessel category after qualification for QS is determined, based on the vessel that person used in that person's most recent year of participation. Third, paragraphs (6) and (7) are revised to more clearly describe vessel category assignments if, in the most recent year of participation, a qualified person used

more than one vessel in different categories, or that person used one vessel in one category for halibut and another vessel in a different category for sablefish. Finally, paragraph (8) was changed, and paragraph (9) added, to more clearly explain the assignment of QS to vessel categories in the event that no halibut or sablefish were landed in the most recent year of participation. These changes are necessary to clarify the vessel category decision process.

Comment 63: The proposed rule is ambiguous about the disposition of landings from a vessel made by someone other than the QS applicant. If the QS applicant is not able to get a confidentiality waiver from that individual, would the applicant be credited with those landings even though he could not personally claim them on his initial QS application?

Response: Initial allocations of QS will be made based on legal landings recorded on Federal weekly production reports required by §§ 672.5 and 675.5, or recorded on fish tickets required by the laws of the States of Alaska, Washington, Oregon, or California. Different confidentiality protections apply to each of these reports. For example, section 303(d) of the Magnuson Act prohibits NMFS from releasing catch

and production data reported in weekly production reports in a manner that directly or indirectly discloses the identity or business of the person who submitted the report. NMFS may release these catch and production data to the submitter of the weekly production report (i.e., the vessel operator and the vessel owner), both of whom are responsible for the submission of these reports under Federal fishery regulations.

State laws regarding the confidentiality of fishery data apply to [*59395] the release of catch and landings data recorded on state fish tickets. For example, the confidentiality of data recorded on State of Alaska fish tickets must be maintained pursuant to Alaska Statutes 16.05.815. The State's Department of Law has concluded that these data may not be released to a vessel owner or lease holder unless (a) the vessel owner or lease holder recorded the landing on a State fish ticket, or (b) the vessel owner or lease holder obtains a waiver of confidentiality from the individual who recorded the landings on the fish ticket.

Due to the various confidentiality protection afforded by state and Federal law, it is possible that a QS applicant will be eligible for an initial allocation of QS based on legal landings

recorded or submitted to NMFS or to a state agency by a person other than the applicant. Under such circumstances, confidentiality laws will prevent NMFS from crediting those landings data to the QS applicant without a written confidentiality waiver signed by the submitter.

Comment 64: The proposed rule preamble and regulatory text at § 676.20(d)(2) indicate that initial allocations of QS will be based on uncontested catch and vessel ownership or lease data. It is possible that the ultimate resolution of contested data could affect the vessel category assignment of the original uncontested data. How would this be resolved?

Response: Each allocation of QS will be assigned to a vessel category as prescribed at § 676.20(c). The potential of a person receiving an initial allocation of QS in more than one vessel category is addressed in that paragraph. This regulation makes no provision for changing the vessel category assignment of QS after it has been issued because such an event was not contemplated by the Council in its motion. Unique vessel category assignment problems will be considered on a case-by-case basis and assignments may be appealed.

Comment 65: The IFQ program approved by the Council contained a provision for overages but none for underages. Adding a harvest underage (§ 676.17(b)) to the following year's IFQ was discussed by the Council and rejected due to biological concerns.

Response: NOAA agrees that large amounts of underages in any year could provide for a total IFQ harvest in excess of the fixed gear TAC. At the extreme, NOAA would have to limit the reallocation of underages if overfishing were threatened. Therefore, §§ 676.17(b) and 676.20(f)(1) are changed to delete authority to reallocate unharvested amounts of IFQ less than 5 percent of the amount specified under the IFQ permit. As originally proposed, amounts of IFQ less than 5 percent of the amount specified under the IFQ permit could be reallocated to the following year. This was intended to complement the reverse provision of subtracting up to 5 percent of an IFQ overage from the allocation in a succeeding year and to reduce overages. Adding large amounts of unharvested IFQ to a succeeding year's total IFQ allocated could result in a more serious biological problem than subtracting overharvested IFQ. Unharvested amounts of IFQ in any year or area will be foregone in subsequent years or other areas.

Comment 66: The proposed rule would not allow a QS owner to sell all QS in any year in which it was leased.

Response: No part of any QS can be transferred at once to different persons. A QS transfer would not be approved if the person transferring it did not currently hold it. Leased QS is held by the lease holder, not the original QS holder, until the lease expires. However, a transfer of QS to one person could be made effective immediately after the expiration of a lease to a different person.

Comment 67: The Council intended the ownership caps to apply to QS and IFQs, but the proposed rule would allow a person to acquire QS up to the ownership limit regardless of the amount of IFQ it represents. The Council understood that ownership of QS up to the 1 percent limit (for sablefish) could result in more than 1 percent of the IFQ for an area in subsequent years. This could result from variance in the QS pool or the area TAC or both. The excess IFQ in such cases should be usable providing that the QS and IFQ limits were not exceeded in the year they were acquired. However, excess IFQ should not be issued if the QS on which it is based is acquired through inheritance or court order.

Response: The rule differs from the language of the Council's motion with respect to personal limits on QS or IFQ. This difference was explained in the preamble to the proposed rule (under "Limits on QS Use" at 57 FR 57137). Briefly, it is neither expedient nor practical for the Secretary to impose a limit on the amount of QS that a person "owns" or "holds" as contemplated by the Council. This is because some transfers will occur by operation of law that are not approved by the Regional Director. However, the Regional Director will control the "use" of QS to harvest IFQ fish through the issuance of an IFQ permit. Therefore, the rule indirectly implements the Council's limits on "owning" QS by imposing a limit on "using" QS. In practice, the QS use limitations prescribed at § 676.22 (e) and (f) are governed by the amount of approved QS relative to the QS pool for an area or combined areas. To this extent NOAA notes that proposed § 676.22(e) incorrectly specifies the sablefish QS use limit as 1 percent of the combined sablefish TAC for the GOA and BSAI areas. The limit should be 1 percent of the combined total sablefish QS for the GOA and BSAI areas to be consistent with the Council's motion and amendment text, with the use limit for the area east of 140 degrees west longitude, and the halibut QS use limits. This mistake in the

proposed rule is corrected by adding text in the first sentence of § 676.20(f) limiting the assignment of IFQ to the QS use limitations specified at § 676.22 (e) and (f). This change clarifies that the QS use limitations will be governed by the issuance of IFQ on approved amounts of QS that are within those limitations unless excess amounts were received by the QS holder in the initial allocation.

Approved amounts of QS will be issued all of the IFQ due from that QS up to the prescribed limits. The only exception is that an initial allocation of QS that exceeds a use limit will be issued additional IFQ based on that part of the initially allocated QS that is over the limit. Changes in the QS pool may affect QS use, but changes in the TAC will not. For example, sablefish QS (not initially allocated) at the 1 percent limit one year could be fully used by having an IFQ permit issued based on the full amount of QS. If the QS pool is decreased in the following year, then the sablefish QS, unchanged from the previous year, will exceed the 1 percent limit. An IFQ permit would be issued on 1 percent of the QS, and the excess QS over 1 percent would not be "funded" with IFQ that year. Changes in the QS pool from year to year, however, are likely to be less pronounced than changes in the TAC. Sablefish QS holdings at or near the use limits may

result in sablefish IFQ that is more or less than 1 percent of the TAC (or of the total IFQ) in any given year. Hence, if a QS holding within use limits yields an IFQ that is excess to 1 percent of the TAC, that IFQ would still be available to harvest by the holder of the QS on which the IFQ is based. However, IFQ would not be issued for transferred QS that has not been approved by the Regional Director or QS in excess of the use limitations (unless received in the initial allocation).

Comment 68: An exception to the requirement for catcher vessel QS holders to be onboard the vessel during fishing operations is provided at [*59396] § 676.22(i)(1). This exception would allow an individual who receives an initial allocation of catcher vessel QS to be represented onboard by a hired skipper. The exception does not apply to individuals who receive an initial allocation of halibut in area 2C or sablefish east of 140 degrees west longitude. The rule should clarify that it also does not apply to corporations or partnerships that receive initial QS in these areas. Also, the rule should clarify that corporations and partnerships that receive initial QS for these areas must have any additional QS in an individual's name and that individual must be onboard the vessel

during harvesting and landing of IFQ species.

Response: The exception to the catcher vessel QS-holder-onboard requirement at § 676.22(i) is applied to corporations and partnerships at § 676.22(j). NOAA agrees that explanatory language in the Council's IFQ motion and amendment text indicate that the exception does not apply to additional catcher vessel QS of halibut in area 2C or sablefish east of 140 degrees west longitude. Therefore, § 676.22(j) is changed to require corporations and partnerships to receive transferred catcher vessel QS of halibut in area 2C or sablefish east of 140 degrees west longitude only in the name of an individual. This change clarifies that the provisions for catcher vessel QS use by corporations and partnerships apply only to initial allocations of halibut QS in area 2C and to initial allocations of sablefish QS in the area east of 140 degrees west longitude. Transfers of additional QS within these areas must be to an individual as required by § 676.21(b) and be used pursuant to § 676.22 (c) and (i).

Comment 69: The provision to eliminate the fixed gear sablefish reserve was not addressed by the Council in its plan amendment language.

Response: Although the Council's IFQ motion and plan amendment text were silent on using the reserve, the language of both documents refers to determining the IFQ by multiplying the QS/(QS pool) ratio to the fixed gear TAC. In the BSAI area, the TAC for any species or gear group subdivision of a species is the TAC that is annually recommended by the Council and specified by the Secretary pursuant to § 675.20(a)(2). Initially, 15 percent of each TAC is placed in a reserve which is not designated by species (§ 675.20(a)(3)) so there is no "sablefish reserve" per se. The reserve is used during the fishing year to account for uncertainty in biological estimates and fishing operations. The amount available for fishing after subtraction of the reserve is the initial TAC and is specified annually (e.g., 58 FR 8703, February 17, 1993). NOAA interpreted the Council motion and plan amendment text to mean the full TAC, without deduction for the reserve, because the text used "TAC" not "initial TAC." This interpretation is reasonable because any reapportionment of the reserve to fixed gear sablefish during the fishing year would require a mid-year allocation of IFQ. Such mid-year allocations would be disruptive to the fishing and business plans of sablefish fishermen.

Comment 70: Regulations regarding permits at § 676.13(a) should include a requirement that the IFQ permit and IFQ card correspond to the same allocation to prevent someone from using a permit and card issued to different people. Also, a statement should be added to § 676.13(b) stating that permits will identify the initial allocation status of the permit holder. This would assure that IFQ corresponding to initially allocated QS for halibut in area 2C, for example, may be harvested and landed by hired skippers.

Response: IFQ permits and cards may be issued to different persons. For example, an IFQ permit holder may want to use a hired skipper or crew to catch and land IFQ fish on the permit holder's allocation. In this case, the permit holder would request NMFS to issue additional IFQ cards to those specified individuals. Each additional card, however, would be coded so that landings made with those cards would be tied to one IFQ allocation. Additional coding on an IFQ card would indicate whether it was tied to an initial allocation and therefore eligible for the QS-holder-onboard exemption at § 676.22(i)(1).

Comment 71: In § 676.14(d), does "holding a valid IFQ permit and IFQ card"

mean that the same person's name would be on each? The Council did not want to prohibit hired skippers from undertaking dockside sales.

Response: No. The same person's name does not have to be on the IFQ permit and the IFQ card. There is no limit on the number of IFQ cards that could be issued to separate individuals to harvest halibut and sablefish against the IFQ specified under a single IFQ permit. Hence, hired vessel masters would be issued an IFQ card based on the IFQ permit of the vessel owner. Halibut and sablefish landed with an IFQ card would be credited to the associated IFQ permit.

Comment 72: The prohibition at § 676.16(h) (formerly § 676.16(g)) should be more explicit. It should say it is unlawful to: "Discard Pacific cod and rockfish when any IFQ card holder onboard holds unused sablefish or halibut IFQ for that vessel category and the area in which the vessel is operating."

Response: In the final rule, § 676.16(g) is redesignated § 676.16(h) and revised pursuant to comment 78. The suggested change is not necessary because the revised paragraph prohibits the discard of Pacific cod or rockfish that are taken when IFQ halibut or IFQ

sablefish are onboard a vessel. Further, the harvest of IFQ halibut or IFQ sablefish in an area or vessel category other than that for which an IFQ card holder has authority to harvest would violate § 676.22(a). Hence, § 676.16(h) would not apply to an IFQ card holder who is involved in fixed gear fishing that results in the catch of Pacific cod or rockfish from a vessel and in an area other than that specified under his IFQ permit. In this case, he would be required to discard any bycatch of halibut or sablefish.

Comment 73: At § 676.17(a)(1), a requirement to have a valid IFQ card with unused IFQ should be added.

Response: NOAA agrees and has changed this paragraph to require a person seeking a vessel clearance under § 676.17(a)(1) to have valid IFQ card or cards. This additional requirement is consistent with possession of a valid IFQ permit. The requirement to have "IFQ that is equal to or greater than all IFQ sablefish and IFQ halibut onboard" is the same as having unused IFQ because IFQ is decreased by the amount of halibut or sablefish landed.

Comment 74: A transfer of QS should be disapproved, under § 676.21(e), if it would result in an amount of IFQ that

exceeds the use limits based on the current year TACs. Also, approving a transfer and then disallowing the use of the QS is illogical.

Response: The IFQ program implementing rules make a necessary distinction between QS and IFQ. Basically, an annual allocation of IFQ to any person is based on the QS held by that person on January 31 of that year (§ 676.20(f)(2)), to the extent that the QS held is within QS limits; use limits to a QS holder are not based on the current year TACs (see response to comment 67). A person can increase his or her IFQ within a year by receiving an approved transfer of IFQ. This can also be done by transferring QS on which the transferred IFQ is based or by leasing IFQ within the limits prescribed at § 676.21. However, QS could be transferred without transfer of its associated IFQ. For example, a fisherman may have completely used his IFQ by June of one year and then [*59397] transferred his QS to another fisherman later the same year. The fisherman receiving such QS would not be allocated IFQ associated with the transferred QS until the following year. A decision to approve or disapprove a QS transfer in this case could not be based on the resulting amount of IFQ because the IFQ does not exist in the current year; it would not be realized by the QS holder

until the year following approval of the QS transfer. In a different scenario, QS could be transferred by operation of law. Issuance of IFQ associated with that QS (if any) would not occur until the Regional Director approves the transfer for purposes of harvesting halibut or sablefish pursuant to § 676.21(e). This independent handling of QS and IFQ provides an effective means of implementing the QS ownership and holding limitations prescribed at § 676.22. Paragraph (c) of § 676.21 prevents QS from being used for fishing prior to the Regional Director's approval if the transfer occurs by operation of law, and has been rewritten to clarify this restriction in reference to paragraph (e) of this section. For administrative efficiency, all transferred QS will be controlled in the same manner (i.e., through the issuance of IFQ) because the only way for QS to be used to harvest halibut or sablefish is to have the associated IFQ (see response to comment 67).

Comment 75: An additional criterion for transfer approval should be added to § 676.21(e)(1) to prevent resale/buyback arrangements designed to circumvent anti-leasing provisions. The criterion would stipulate that the person applying to receive catcher vessel QS had not

previously transferred QS to the same person applying to relinquish it.

Response: No change is made based on this comment. The suggested requirement would unnecessarily constrain the market for QS and add complexity that could slow transfer approval. The prevention of leasing can be accomplished more simply by careful monitoring of QS transfers over time. If additional information about QS transfers is needed to prevent leasing, it can be requested without changing the regulations under § 676.21(e)(1)(vii).

Comment 76: At § 676.24(j)(5) (formerly § 676.25(j)(5)), landings of CDQ halibut or sablefish should be made by a person with a valid CDQ card and only to a registered buyer.

Response: NOAA agrees and this paragraph (which was changed to § 676.24(j)(5); see change 16 above) is changed to clarify that CDQ halibut or sablefish must be landed by a person with a valid CDQ card and to a person with a valid registered buyer permit. This change corrects an editorial oversight in the proposed rule. In addition, the same exceptions for dockside sales and outside landings as are provided at § 676.14(d) are provided for CDQ halibut or sablefish in § 676.24(j)(5).

Comment 77: The proposed regulations regarding sablefish would not apply in State waters. This should be made more explicit. In particular, they should state that sablefish fishing in Prince William Sound and waters of Southeast Alaska would be exempt from the Federal IFQ program and that the State is not relinquishing management authority over fisheries that may develop in other State waters. In addition, State regulations allow the retention of sablefish incidentally harvested by drift gillnet gear in Cook Inlet and other places. The proposed rules would require such sablefish to be treated as prohibited species. Although the incidental catch of sablefish while salmon fishing is not likely, existing State regulations allow for retention while the proposed rules would not. There are other potential inconsistencies relating to the possession of sablefish with an IFQ card in inside versus outside waters.

Response: NOAA agrees that regulations implementing the IFQ program with regard to sablefish do not apply in State internal waters and the adjacent territorial sea (State waters) to persons who do not have an IFQ permit described at § 676.13. However, the regulations in part 676 apply to all persons with current IFQ permits even when they

operate within State waters. This clarification is made by revising the definitions of "IFQ sablefish" and "IFQ regulatory area" at § 676.11 and by adding text to §§ 676.12(c) and 676.13(a) relative to fishing within State waters. Drift gillnet gear is not included in the definition of "fixed gear" at § 676.11, so sablefish harvested in State waters by a person with this gear would not be subject to IFQ program rules regardless of whether that person held an IFQ permit.

Comment 78: Alaska Department of Fish & Game (ADF&G) is concerned about how the proposed bycatch allowances and season structure will affect other fisheries managed by either ADF&G or NMFS. These concerns are as follows:

(a) Prohibiting the discard of Pacific cod or rockfish may preempt existing State regulations regarding harvest allowances for these species. It should be more clear that the bycatch, directed fishing allowances, or annual harvest limits set by either ADF&G or NMFS cannot be exceeded.

(b) The sablefish bycatch allowance of 4 percent may have to be adjusted upward to prevent waste.

(c) The proposed sablefish season of March 1 through November 30 would not provide adequate protection for spawning sablefish stocks. Also, sablefish from internal waters could be still on the outside grounds early in the year. This suggests that early-year harvests could reduce later harvests of sablefish in State waters. ADF&G recommends a sablefish season of May 15 through November 30. This was the season for offshore sablefish prior to implementation of the Magnuson Act. It would avoid overlap with sablefish and halibut spawning periods, reduce the potential of double-harvesting sablefish populations from internal waters, and reduce the likely high bycatch of halibut during an early-season sablefish fishery.

(d) If establishing the halibut season on an annual basis is left to the IPHC, there is a potential for different seasons for both species. This seems contrary to the intent of minimizing bycatch problems.

Response: (a) NOAA agrees that retention of Pacific cod or rockfish while fishing in State waters should not be required in contravention of State regulations. Section 676.16 is changed to expand the exceptions to the prohibition on discarding fish to include State

requirements in redesignated paragraphs (h) and (l). Paragraph (h) prohibits the discard of Pacific cod or rockfish taken incidental to the harvest of IFQ fish to prevent wasting these species. Paragraph (l) prohibits the discard of halibut or sablefish caught with fixed gear from any catcher vessel when any IFQ card holder onboard has unused IFQ for these species in the area and vessel category in which the catcher vessel is operating. Both of these paragraphs provide exceptions to these discard rules in the event that other Federal regulations require discarding of these species for biological conservation purposes.

(b) Directed fishing standards for sablefish caught with fixed gear are specified at §§ 672.20(g)(4) and 675.20(h)(4). When directed fishing is prohibited, amounts of sablefish on a vessel in excess of prescribed amounts would constitute a violation of the prohibition. This management tool is commonly used in-season to close an open access fishery when the TAC for sablefish is nearly exhausted. Under the IFQ program, however, the directed fishing season for sablefish would remain open during the dates prescribed [*59398] at § 676.23(b). Sablefish caught with fixed gear at other times during the year could be retained by IFQ holders within the "bycatch allowances" specified in §§

672.20(g)(4) and 675.20(h)(4). Other catches of sablefish with fixed gear would have to be discarded. NOAA perceives no need at this time to adjust these bycatch limits for sablefish as they are unlikely to allow for any more waste than is occurring already under open access management. To clarify this point, however, § 676.23(b) references §§ 672.20(g) and 675.20(h) and is changed to provide specifically for retention of sablefish up to prescribed limits during periods when directed fishing is prohibited.

Paragraph (a), in regards to halibut, references §§ 672.20(e) and 675.20(c) and states that catches of halibut by fixed gear taken at times other than those specified at 50 CFR part 301 must be treated as prohibited species.

(c) Harvesting sablefish during their spawning period is not necessarily harmful to the stock providing that such harvesting does not result in recruitment overfishing. Another argument against harvesting during or immediately after winter spawning is that the fish are in poor physical condition and product yield and value is less than if harvesting were delayed until summer and fall months. The IFQ program will allow fishermen to time their harvesting according to market demand. If sablefish harvesting in the

first 2 months of the season produces a low-valued product, then it is likely that few fishermen will participate in the fishery at that time. Although some fish tag recovery studies indicate migration of sablefish between EEZ and State waters in southeast Alaska, it is not clear that allowing fishing in the EEZ before May 15 will cause significant harm to sablefish fisheries in State waters later in the year. The inclusion of halibut in the development of the sablefish IFQ program was specifically intended to resolve a potential bycatch problem. Fishermen with IFQ for both species will be able to retain and land both species regardless of their target species. Hence, the IFQ program should minimize halibut bycatch wastage.

(d) Although it is true that halibut bycatch will be minimized only if the IPHC prescribes a compatible season for halibut fishing in and off of Alaska, NOAA is hopeful that the IPHC will take this action. The IPHC extended the season for the halibut fishery in area 2B in and off of British Columbia in response to a similar individual quota program implemented by Canada. NOAA is not changing the fishing season for halibut in this rule to prevent conflict with the fishing seasons prescribed by the IPHC as required by the section 5(c) of the Halibut Act.

Comment 79: Regarding the definition of an "IFQ crew member," it may not be possible to determine the months of actual experience a person has accumulated from State records. In addition, the time requirement should be consistent throughout the rules (5 months at § 676.11 and 150 days at § 676.21(e)(2)(i)). Delete the words "at sea" from § 676.21(e)(2)(i) as this may prevent some participation in some fisheries that do not occur at sea. The rules should clarify what experience, in addition to actual harvesting, will qualify as crewing experience. For example, would preparing the vessel or gear, traveling to and from fishing grounds, tendering, working as a spotter pilot, piloting a vessel, acting as a skipper, or operating fishing gear qualify as harvesting crew experience?

Response: NOAA agrees and has clarified the definition of "IFQ crew member" by changing the minimum experience period from 5 months to 150 days. Although the Council's motion states the period in months, the same period in days is preferred because it is more specific, and makes the definition consistent with § 676.21(e)(2)(i). In addition, the kind of activities that would be done by "harvesting crew" are clarified. Examples of activities not

considered work of a harvesting crew are added to the definition. The phrase "at sea" is deleted from § 676.21(e)(2)(i) to clarify that harvesting crew experience in a U.S. commercial fishery that does not occur "at sea," for example, in lakes or internal waters, would qualify for purposes of the IFQ crew member definition.

Comment 80: Regarding the proposed recordkeeping and reporting requirements, several inconsistencies with existing State regulations are noted. Reporting the landing of IFQ fish would be required within 6 hours, but the State requirement is within 7 days. The State does not require shipment reports as proposed by the IFQ regulations. Dockside sales of IFQ fish would require a buyers permit, but State regulations allow any permitted fisherman to sell unprocessed fish at the dock.

Response: NOAA perceives no conflict between these more restrictive Federal regulations on the reporting of IFQ fish and the existing State reporting requirements. The recordkeeping and reporting requirements of the IFQ program are not intended to preempt State reporting requirements, and are designed to adequately monitor IFQ landings and assure the integrity of the program. NOAA is hopeful that the State and NMFS will

develop procedures to minimize duplication in satisfying required reports. As such, the State may realize a benefit in better quality landings data submitted more quickly than under current procedures.

Comment 81: It is not clear whether the vessel check-out requirement at § 676.17(a) is in addition to, or substitute for, State requirements at 5 AAC 39.130 to report exports of unprocessed fishery resources.

Response: The vessel check-out requirement at § 676.17(a) is in addition to other reports and requirements that constitutionally may be imposed by State law.

Comment 82: The IFQ regulations should clarify that requirements to have an IFQ permit and a registered buyer permit are in addition to State requirements concerning permits for fishermen, buyers, and processors of fish.

Response: The permit requirements at § 676.13(a) are in addition to other requirements that constitutionally may be imposed by State law.

Comment 83: Language in § 676.24(a)(1) (formerly § 676.25(a)(1)) limits the eligibility of communities for the CDQ

program to those that are "proximate to" an IPHC area. The State understands that this is in reference to the boundary of a particular management area and not a requirement that communities be proximate to the Bering Sea coast. As such, the communities listed in Table 1 of the proposed regulations are qualified to participate in the program. The IPHC management area that each eligible community qualifies for is that area in which the community either: (a) Lies between the points where the management area boundary intersects the coastline; or (b) is within 10 miles from the point where the management area boundary intersects the coastline, if the community lies outside the management area.

Response: The State's understanding is correct.

Comment 84: There appears to be no reason to require implementation of the CDQ program for halibut and sablefish to coincide with full implementation of the IFQ program. Development of the CDQ program could be constrained if it were to wait for completion of all IFQ administrative procedures. Could the CDQ program begin in 1993?

Response: Implementation of the CDQ program in 1993 would be administratively

difficult for several reasons. First, the sablefish CDQ program requires (§ 676.24(b) (formerly § 676.25(b)) notice and comment on the [*59399] specific amounts of the sablefish CDQ reserve in the proposed and final harvest specifications published pursuant to § 675.20(a). These specifications for 1993 already have been published (57 FR 57718, December 7, 1992, and 58 FR 8703, February 17, 1993). Second, the halibut fishing periods prescribed at 50 CFR 301.7 are based on an open access management regime that is not relevant to a CDQ management regime. Changing these fishing periods for 1993 would require an extraordinary meeting of the IPHC and another Federal Register publication. Third, control of the halibut and sablefish CDQ programs would be exercised through the issuance of CDQ permits and CDQ cards (§ 676.24(j) (formerly § 676.25(j))). This control mechanism is designed to work with the IFQ permit and card system. NOAA has not yet fully developed either of these systems. Finally, the Council clearly intended that the CDQ program be implemented simultaneously with the IFQ program. Therefore, the CDQ program will be implemented concurrently with overall implementation of the IFQ program.

Comment 85: The proposed rule at § 676.24(b) (formerly § 676.25(b)) limits a

sablefish CDQ allocation to any one applicant to a maximum of 12 percent of the total CDQ for all subareas. The Council's motion applied this restriction to any eligible community. It would be desirable to maintain the existing CDQ groupings that evolved under the pollock CDQ program first implemented in 1992. With no more than five or six CDQ group applications, the most that could be allocated under the proposed 12 percent limit would be 72 percent of the sablefish CDQ. The State recommends changing the rule to allow one applicant group to receive up to 33 percent of the total sablefish CDQ allocation, and that this provision be combined with the original Council proposal to limit any one community to no more than 12 percent of the total sablefish CDQ.

Response: After implementing the pollock CDQ program (57 FR 54936, November 23, 1992), NOAA agrees that limiting a CDQ allocation to any applicant to 33 percent of the total sablefish CDQ for all subareas would be more consistent with the pollock CDQ program (see § 675.27(c)(1)). However, it would be practically impossible to assure that no one community received more than 12 percent of the total sablefish CDQ when that community was grouped with other communities in receiving a CDQ allocation of up to 33 percent of the

total. The approved FMP amendment text would limit any western Alaska community to no more than 12 percent of the total sablefish CDQ. Under a literal interpretation of this text, it is conceivable that eight communities that may form a single group under the pollock CDQ program could receive virtually all of the sablefish CDQ. NOAA deviated slightly from this interpretation in the proposed rule by suggesting a 12-percent limit for any one applicant to simplify the accounting of sablefish landed against a CDQ allocation. For the reasons explained in the comment, this approach may not be ideal. Nevertheless, NOAA is not authorized to deviate substantially from the approved FMP amendment text. The Council could recommend another FMP amendment to the Secretary if this issue becomes a significant management problem in the future.

Comment 86: The proposed IFQ program will place increased demands on the State Commercial Fisheries Entry Commission (CFEC) for individual catch data and vessel ownership records. The CFEC's ability to respond to these requests has weakened in recent years due to budget reductions.

Response: NOAA intends to establish a unified database that includes all relevant catch and vessel ownership records on which the initial allocation

of QS will be based. Cooperation with the CFEC and other state and Federal agencies will be necessary to establish this data set. After it is established, all queries should be directed to the IFQ program manager, Alaska Region, NMFS. Corroborating data from the State's fish ticket archives may be requested by fishermen. The State will be expected to respond to such requests as possible within its personnel and budget resources.

Comment 87: The State has a strong interest in collecting certain types of data on fish landings through its fish ticket system. These data are important for social and economic analyses. It is important that the IFQ program not interfere with the collection of these data. Further, monitoring the regional distribution of QS holdings is important because of concerns about social and economic impacts. The CFEC monitors permit transfers under the Alaska limited entry program because of these concerns and regularly reviews transfers to track changes in the residence status of permit holders. NMFS should monitor transfers of QS in similar ways.

Response: Implementation of the IFQ program should not interfere with the collection of fish ticket data by the State. NOAA is aware of the need to

monitor the transfer of QS between rural and urban areas, and intends to develop a QS transfer approval system that will provide useful data in response to social and economic impact concerns.

Comment 88: The major concern of the State is that the proposed IFQ program could lead to excessive consolidation of fishery access privileges and speculative investment in, and absentee-ownership of, QS by non-fishermen. These outcomes could cause substantial harm to Alaskan fishermen, shore-based processing industry, and coastal communities. For these reasons, the State considers the restrictions on transferability and use of QS to be essential to the success of the program.

Response: The limitations on QS use, QS and IFQ transfer, and the requirement for catcher vessel QS holders to be onboard during fishing operations are expressly intended to prevent the outcomes of concern to the State.

Comment 89: The North American Free Trade Agreement (NAFTA) appears to override the Council's intent to limit participants in the proposed halibut and sablefish IFQ program to U.S. citizens. Will Canadian or Mexican corporations be allowed to purchase halibut and sablefish QS under NAFTA? The Canadian IQ program

allows foreign ownership of Canadian fishing rights because investment by Canadian corporations is not limited by a citizenship restriction. Will the United States reciprocate by relaxing the proposed citizenship requirements in the IFQ program?

Response: The U.S. citizenship requirements of the IFQ program will not be affected by NAFTA. The agreement includes an exception for the United States regarding fishing in U.S. waters.

Comment 90: The IFQ regulations should not discourage individuals from owning their vessels as solely-owned corporations for business reasons. As proposed, an individual who qualifies for an initial allocation of catcher vessel QS as an individual, but who later incorporates as a solely-owned corporation, would not be able to take advantage of the IFQ holder-on-board exception at § 676.22(i)(1) because the corporation now owns the vessel and not the individual. In addition, the same individual would not be able to transfer his QS to his solely-owned corporation because of the transfer restrictions at § 676.21. The rule should be modified to allow a solely-owned corporation to act as an individual for purposes of these sections.

Response: NOAA agrees that initial allocations of catcher vessel QS, as proposed, were too constraining and has [*59400] changed § 676.21(b) to allow individuals who receive an initial allocation of catcher vessel QS to transfer that QS to their solely-owned corporation. This will provide an individual who qualifies for an initial allocation of catcher vessel QS and subsequently forms a solely-owned corporation to enjoy the same benefits of being incorporated as the Council intended for corporations or partnerships that receive an initial allocation of catcher vessel QS. This change is consistent with the Council's intent and does not substantively change the effect of the rule because solely-owned corporations will be subject to the limitations of § 676.22(j) in the same manner as any other corporation or partnership that receives an initial allocation of catcher vessel QS. Note that § 676.22(j) also is changed by this action to prevent corporations from acquiring additional catcher vessel QS for halibut in area 2C or sablefish east of 14 degrees west longitude (see response to comment 68). Hence, any corporation or partnership may receive transferred QS for these species in these areas only in the name of an individual, regardless of whether the corporation or

partnership received an initial allocation as provided in § 676.21(b).

The basic policy regarding initial allocations of catcher vessel QS recognized the fact that many individuals who own and operate fishing vessels in the halibut and sablefish fisheries are incorporated for legitimate business reasons. Initial allocation to such persons as corporate entities was considered to be consistent with current practice in the fishery, providing that subsequent transfers of catcher vessel QS to a person who did not receive an initial allocation of catcher vessel QS, or to any person in IFQ regulatory areas 2C and east of 140 degrees west longitude, were to individuals and also that a change in a corporate entity resulted in a transfer of its catcher vessel QS to an individual. This was to protect against a corporate buy out of a fishery that is characterized by small, family owned-and-operated fishing businesses. NOAA sees little distinction between such small family-owned businesses and solely-owned corporations.

NOAA does not agree, however, that § 676.22(i)(1) should be changed to accommodate solely-owned corporations. The exception provided to individuals by this paragraph is also provided to

corporations by § 676.22(j). This paragraph accommodates, not discourages, solely-owned corporations or any other corporate entity or partnership in those areas of the fishery other than IFQ regulatory areas 2C and east of 140 degrees west longitude. Eventually, however, all such corporate entities that have catcher vessel QS must transfer it to an individual as required by § 676.22(j) as they acquire additional QS in area 2C or east of 140 degrees longitude, and as they change through the addition of new corporate shareholders or partners. This requirement implements the policy of all catcher vessel QS ultimately being in the hands of individuals instead of corporations, and having those individuals onboard vessel at all times when fishing for and landing IFQ species.

Comment 91: What type of ownership interest is created by the IFQ plan, and what is the estimated value of that interest?

Response: The IFQ regulations allocate transferrable harvest privileges in the form of QS and IFQ in the halibut and sablefish fixed gear fisheries. The QS and IFQ may be held, used, purchased, sold, or otherwise transferred in accordance with the implementing regulations. However, these regulations

do not convey property rights in the fishery resources, and cannot legally because no property rights can accrue until halibut or sablefish are reduced to one's possession by capture. Furthermore, the IFQ program is not irreversible. The Council and the Secretary have the statutory responsibility to conserve and manage these fisheries, and may modify or even terminate this program as necessary to meet that responsibility. Thus, the QS and IFQ allocated in accordance with these regulations is not necessarily permanent, and is subject to future regulatory changes that could result in diminution or even negation of QS and IFQ market value. As such, the QS and IFQ are temporary revokable permits that authorize the holder to participate in the fixed-gear fisheries for halibut and sablefish so long as the IFQ program remains in effect. Consequently, the IFQ program does not establish an entitlement to QS and IFQ, which, if "taken" by the Government, requires just compensation under the Fifth Amendment to the U.S. Constitution.

The market value of QS is difficult to predict because of unknown variables that will affect that value. For example, the market value could be affected by annual fluctuations in halibut and sablefish quotas, changes in market prices for halibut and sablefish, and future

regulatory actions that could diminish or even negate the value of the QS and IFQ, and the public's perception of the duration of the program. In economic terms, the price that a fisherman is willing to pay for QS will be no more than the net present value of its expected future earnings (minus fishing costs).

Comment 92: In describing various constraints of the proposed rule, public comment was specifically requested on 7 different types of restrictions. These restrictions would generally limit the economic efficiency of the fishing fleet operating under the IFQ program, and the Secretary expressed particular interest in the need or efficacy of the proposed restrictions. Such restrictions include QS use limitations (§ 676.22 (e) and (f)), vessel harvest limits (§ 676.22(h)), the catcher vessel QS holder-on-board requirement (§ 676.22(i)), and vessel category limitations (§ 676.16(o)). The Secretary also requested comment on whether the proposed 180-day QS application period was a reasonable length of time. Several letters of comment responded to these specific points. All of the comments supported the measures as proposed. Generally, they claimed that the restrictions were needed to mitigate the economic and social disruption that could

occur under an untested or unrestricted IFQ program. Comments expressed the desire to maintain the basic character of the fixed gear fleet as being comprised mostly of small, owner-operator vessels, and prevent excessive consolidation. Comments also cited the need to maintain traditional relationships between vessel owner, crew, and processor, and to provide opportunity for crew members to move up to be a vessel owner. The restrictions would satisfy these needs, and losses in economic efficiency are outweighed by gains in social stability.

Response: NOAA notes these comments. No changes are made with respect to the proposed restrictions.

Classification

NOAA determined that Amendments 15 and 20 to the FMP and the companion regulatory amendment to effect the IFQ program for the Pacific halibut fishery in and off of Alaska are necessary for the conservation and management of the fixed gear sablefish and halibut fisheries in and off of Alaska. This final rule implementing Amendments 15 and 20 is published under section 305(a)(1) of the Magnuson Act that requires the Secretary to publish regulations that are necessary to carry out a plan or plan amendment. The Secretary has determined

that Amendments 15 and 20 are consistent with the national standards, other provisions of the Magnuson Act, and other applicable laws. The Secretary has determined also that the companion regulatory amendment to implement the [*59401] IFQ program for the Pacific halibut fishery in and off of Alaska is consistent with the Halibut Act and other applicable laws.

An FEIS for the amendments was filed with the Environmental Protection Agency; a notice of its availability was published on December 11, 1992 (57 FR 58805). The FEIS includes a regulatory impact review cost-benefit analysis. A copy of the FEIS and cost-benefit analysis may be obtained from the Council (see ADDRESSES).

A regulatory flexibility analysis was prepared that describes the effects this rule will have on small entities. This analysis is contained in the FEIS. Based on this analysis, the Secretary concluded that this rule will have a significant economic impact on a substantial number of small entities. A summary of this determination is contained in the proposed rule (57 FR 57130, December 3, 1992).

This rule involves collection-of-information requirements

subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, et seq.) that have been approved by OMB. The estimated response time for each collection-of-information required during the 2-year implementation period is expected to be 5.5 hours for the QS application, 4 hours to file an appeal on a QS application, and 2 hours for an IFQ crew member eligibility application.

The estimated response time for each collection of information during each year after the implementation period is 1 hour for notification of inheritance of QS, 2 hours for the application for transfer or lease of QS/IFQ, 2 hours for the corporate/partnership or other entity transfer application, 0.5 hours for the registered buyer application, 0.1 hour for the dockside sale receipt, 0.1 hour for prior notice of landing, 0.1 hour permission to land IFQs at any time other than 06:00-18:00, 0.1 hour for the vessel clearance application, 0.2 hour for the IFQ landing report, 0.1 hour for a transshipment notice, and 0.2 hour for the shipment or transfer report.

Additional costs to the public totaling $ 150,000 for the implementation period and $ 225,000 for each subsequent year are proposed for the IFQ program.

The estimated response time for each information requirement of the CDQ portion of the IFQ program will be approximately 160 hours per CDP, 40 hours for each annual report, 40 hours for each final report, and 10 hours for each amendment to a CDP.

These reporting burdens include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates or any other aspect of the data requirements, including suggestions for reducing the burden, to NMFS, Fisheries Management Division, Alaska Region, P.O. Box 21668, Juneau, AK 99802, and to OMB, Paperwork Reduction Project [OMB control numbers 0648-0272 (IFQs for Pacific Halibut and Sablefish in the Alaska Fisheries) and 0648-0269 (Western Alaska CDQ Program)], Washington, DC 20503.

NMFS determined that this rule will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal management program of the State. This determination was submitted for review by the responsible State agencies under section 307 of the Coastal Zone

Management Act. The State agencies agreed with this determination.

The final rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

The Regional Director determined that fishing activities conducted under this rule will have no adverse impact on marine mammals.

The Regional Director has determined that fishing activities conducted under this final rule will not affect any endangered or threatened species listed under the Endangered Species Act (ESA) in any manner not already considered in the formal consultations conducted on the BSAI FMP and fishery (April 19, 1991), the 1992 BSAI TAC specifications (January 21, 1992), and Amendment 18 to the BSAI FMP (March 4, 1992) and the informal consultations conducted regarding the impacts of the 1993 BSAI TAC specifications on Steller sea lions (January 20, 1993) and the impacts of the 1993 BSAI and GOA groundfish fisheries on listed species of salmon (April 21, 1993) and listed species of seabirds (U.S. Fish and Wildlife Service, February 1, 1993; clarified February 12, 1993). Therefore, NMFS has determined that no further

consultation, pursuant to section 7 of the ESA, is required for adoption of this final rule.

List of Subjects

50 CFR Part 204

Reporting and recordkeeping requirements.

50 CFR Parts 672, 675, and 676

Fisheries, Reporting and recordkeeping requirements.

Dated: November 1, 1993.

Nancy Foster,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50. CFR parts 204, 672, and 675 are
amended and 50 CFR part 676 is added as follows:

PART 204-OMB CONTROL NUMBERS FOR NOAA INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for part 204 continues to read as follows:

Authority: Paperwork Reduction Act of 1980, 44 U.S.C. 3501-3520 (1982).

2. In § 204.1(b), the table is amended by adding the following entries, in numerical order, to read as follows:

§ 204.1 -- OMB control numbers asssigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

50 CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648-)
* * * * *	
676.13	-0272
676.14	-0272
676.17	-0272
676.20(d)	-0272
676.20(e)	-0272
676.21(e)	-0272
676.21(f)	-0272
676.24(d)	-0269
676.24(g)	-0269

* * * * *

PART 672-GROUNDFISH OF THE GULF OF ALASKA

3. The authority citation for part 672 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

4. Section 672.3 is revised to read as follows:

§ 672.3 -- Relation to other laws.

(a) Foreign fishing. Regulations governing foreign fishing for groundfish in the Gulf of Alaska are set forth at 50 CFR 611.92. Regulations governing foreign fishing for groundfish in the Bering Sea and Aleutian Islands area are set forth at 50 CFR 611.93.

(b) Halibut fishing. Regulations governing the conservation and management of Pacific halibut are set forth at 50 CFR parts 301 and 676.

(c) Domestic fishing for groundfish. Regulations governing the conservation and management of groundfish in the

[*59402] EEZ of the Bering Sea and Aleutian Islands area are set forth at 50 CFR parts 620, 675, and 676.

(d) Limited access. Regulations governing access to commercial fishery resources are set forth at 50 CFR part 676.

(e) Marine mammals. Regulations governing exemption permits and the recordkeeping and reporting of the incidental take of marine mammals are set forth at 50 CFR 216.24 part 229.

PART 675-GROUNDFISH OF THE BERING SEA AND ALEUTIAN ISLANDS AREA

5. The authority citation for part 675 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

6. Section 675.3 is revised to read as follows:

§ 675.3 -- Relation to other laws.

(a) Foreign fishing. Regulations governing foreign fishing for groundfish in the Gulf of Alaska are set forth at 50 CFR 611.92. Regulations governing foreign fishing for groundfish in the Bering Sea

and Aleutian Islands area are set forth at 50 CFR 611.93.

(b) Halibut fishing. Regulations governing the conservation and management of Pacific halibut are set forth at 50 CFR parts 301 and 676.

(c) Domestic fishing for groundfish. Regulations governing the conservation and management of groundfish in the EEZ of the Gulf of Alaska are set forth at 50 CFR parts 620, 672, and 676.

(d) Limited access. Regulations governing access to commercial fishery resources are set forth at 50 CFR part 676.

(e) Marine mammals. Regulations governing exemption permits and the recordkeeping and reporting of the incidental take of marine mammals are set forth at 50 CFR 216.24 part 229.

7. In § 675.20, the introductory text of paragraph.(a)(3) is revised to read as follows:

§ 675.20 -- General limitations.

(a) * * *

(3) Reserve. Fifteen percent of the TAC for each target species and the

"other species" category, except the hook-and-line and pot gear allocation for sablefish, is automatically placed in a reserve, and the remaining 85 percent of the TAC for each target species and the "other species" category, except the hook-and-line and pot gear allocation for sablefish, is apportioned between DAH and TALFF. The reserve is not designated by species or species group, and any amount of the reserve may be apportioned to a target species, except the hook-and-line gear and pot gear allocation for sablefish, or the "other species" category, provided that such apportionments are consistent with paragraph (a)(2)(i) of this section and do not result in overfishing of a target species or the "other species" category.

* * * * *

8. A new part 676 is added to chapter VI of 50 CFR to read as follows:

PART 676-LIMITED ACCESS MANAGEMENT OF FEDERAL FISHERIES IN AND OFF OF ALASKA

Subpart A-Moratorium on Entry [Reserved]

Sec.

676.1-676.9 [Reserved]

Subpart B-Individual Fishing Quota General Provisions

676.10 Purpose and scope.

676.11 Definitions.

676.12 Relation to other laws.

676.13 Permits.

676.14 Recordkeeping and reporting.

676.15 Vessel and gear identification.

676.16 General prohibitions.

676.17 Facilitation of enforcement and monitoring.

676.18 Penalties.

Subpart C-Individual Fishing Quota Management Measures

676.20 Individual allocations.

676.21 Transfer of QS and IFQ.

676.22 Limitations on use of QS and IFQ.

676.23 IFQ fishing season.

676.24 Western Alaska Community Development Quota Program.

676.25 Determinations and appeals, [Reserved]

Authority: 16 U.S.C. 773 et seq. and 1801 et seq.

Subpart A-Moratorium on Entry [Reserved]

§§ 676.1-676.9 [Reserved]

Subpart B-Individual Fishing Quota General Provisions

§ 676.10 -- Purpose and scope.

(a) Subparts B and C of this part implement the individual fishing quota management plan for the commercial fisheries that use fixed gear to harvest sablefish (Anoplopoma fimbria) and Pacific halibut (Hippoglossus stenolepis).

(b) Regulations in subparts B and C of this part govern the commercial fishing for sablefish by vessels of the United States using fixed gear within that portion of the Gulf of Alaska and the Bering Sea and Aleutian Islands area over which the United States exercises exclusive fishery management authority. Regulations in subparts B and C of this

part also govern the commercial fishing for sablefish with fixed gear in waters of the State of Alaska adjacent to the Bering Sea and Aleutian Islands management area and the Gulf of Alaska provided that such fishing is conducted by persons who have been issued permits under § 676.13 of this part. The regulations in this part do not govern commercial fishing for sablefish in Prince William Sound or under a State of Alaska limited entry program.

(c) Regulations in subparts B and C of this part govern the commercial fishing for Pacific halibut by vessels of the United States using fixed gear in Convention waters described in 50 CFR part 301 that are in and off of the State of Alaska.

§ 676.11 -- Definitions.

In addition to the definitions in the Magnuson Act and in 50 CFR 301.2, 620.2, 672.2, and 675.2, except as otherwise noted, the terms in this part have the following meanings:

Catcher vessel, as used in this part, means any vessel that is used to catch, take, or harvest fish that are subsequently iced, headed, gutted, bled, or otherwise retained as fresh fish product onboard during any fishing year,

except when the freezer vessel definition applies during any fishing trip.

Community Development Plan (CDP) means an economic and social development plan for a specific Western Alaska community or group of communities that is approved by the Governor of the State of Alaska and recommended to the Secretary under § 676.24 of this part.

Community Development Quota (CDQ) means a western Alaska CDQ for Pacific halibut or sablefish that is assigned to an approved CDP.

Community Development Quota Program (CDQ program) means the Western Alaska CDQ Program implemented under § 676.24 of this part.

Dockside sale means the transfer of IFQ halibut or IFQ sablefish from the person who harvested it to individuals for personal consumption, and not for resale.

Fixed gear means:

(1) With respect to sablefish harvested from any reporting area of the Gulf of Alaska, all hook-and-line gear as that term is defined at § 672.2 of this chapter and, for purposes of determining initial allocation, all pot gear used to

make a legal landing as that term is defined at § 676.20(a)(1)(v) of this part;

(2) With respect to sablefish harvested from any reporting area of the Bering Sea and Aleutian Islands management area, all hook-and-line gear as that term is defined at § 675.2 of this chapter and all pot gear; and [*59403]

(3) With respect to Pacific halibut harvested from any IFQ regulatory area, all fishing gear comprised of lines with hooks attached, including setline gear as that term is defined at 50 CFR part 301.

Freezer vessel means any vessel that is used to process some or all of its catch during any fishing trip.

Governor means the Governor of the State of Alaska.

Halibut CDQ Reserve means the amount of the halibut catch limit for IPHC regulatory areas 4B, 4C, 4D, and 4E that is reserved for the halibut CDQ program.

Harvesting or to harvest, as used in this part, means the catching and retaining of any fish.

IFQ crew member means any individual who has at least 150 days experience working as part of the harvesting crew in any United States commercial fishery, or any individual who receives an initial allocation of QS. For purposes of this definition, "harvesting" means work that is directly related to the catching and retaining of fish. Work in support of harvesting but not directly involved with harvesting is not considered harvesting crew work. For example, searching for fish, work on a fishing vessel only as an engineer, or cook, or work preparing a vessel for a fishing trip would not be considered work of a harvesting crew.

IFQ halibut means any Pacific halibut (Hippoglossus stenolepis) that is harvested with fixed gear in any IFQ regulatory area.

IFQ landing, as used in this part, means the unloading or transferring of any IFQ halibut, IFQ sablefish, or products thereof from the vessel that harvested such fish.

IFQ regulatory area, as used in this part, means:

(1) With respect to IFQ halibut, areas 2C, 3A, 3B, 4A, 4B, 4C, 4D, or 4E defined at 50 CFR part 301; and

(2) With respect to IFQ sablefish, any of the three regulatory areas in the Gulf of Alaska defined at § 672.2 of this chapter, and any subarea of the Bering Sea and Aleutian Islands management area defined at § 675.2 of this chapter, and all waters of the State of Alaska between the shore and the inshore boundary of such regulatory areas and subareas, except waters of Prince William Sound and areas in which sablefish fishing is managed under a State of Alaska limited entry program.

IFQ sablefish means any sablefish (Anoplopoma fimbria) that is harvested with fixed gear either in the EEZ off Alaska or in waters of the State of Alaska by persons holding an IFQ permit, but does not include sablefish harvested in Prince William Sound or under a State of Alaska limited entry program.

Individual means a natural person who is not a corporation, partnership, association, or other such entity.

Individual fishing quota (IFQ) means the annual catch limit of sablefish or halibut that may be harvested by a person who is lawfully allocated a harvest privilege for a specific portion of the total allowable catch of sablefish or halibut.

IPHC means the International Pacific Halibut Commission.

Person, as used in this part, means any individual who is a citizen of the United States or any corporation, partnership, association, or other entity (or their successor in interest), whether or not organized or existing under the laws of any state, that is a United States citizen.

Quota share (QS) means a permit, the face amount of which is used as a basis for the annual calculation of a person's IFQ.

Sablefish CDQ Reserve means 20 percent of the sablefish fixed gear TAC for each subarea in the Bering Sea and Aleutian Islands management area for which a sablefish TAC is specified.

Trip, as used in this part, means the period of time from when a vessel commences fishing until either the vessel enters or leaves an IFQ regulatory area, or the commencement of an IFQ landing, whichever occurs first.

United States citizen, as used in this part, means:

(1) Any individual who is a citizen of the United States at the time of application for QS; or

(2) Any corporation, partnership, association, or other entity that would have qualified to document a fishing vessel as a vessel of the United States during the QS qualifying years of 1988, 1989, and 1990.

§ 676.12 -- Relation to other laws.

(a) Foreign fishing. Regulations governing foreign fishing for groundfish in the Gulf of Alaska are set forth at 50 CFR 611.92. Regulations governing foreign fishing for groundfish in the Bering Sea and Aleutian Islands area are set forth at 50 CFR 611.93.

(b) Halibut fishing. Additional regulations governing the conservation and management of Pacific halibut are set forth at 50 CFR part 301.

(c) Domestic fishing for groundfish. Additional regulations governing the conservation and management of groundfish in the EEZ of the Gulf of Alaska and the Bering Sea and Aleutian Islands area are set forth at 50 CFR parts 672 and 675, respectively, and at 50 CFR part 620. Persons fishing for sablefish in the territorial sea and internal waters of

the State of Alaska also should consult pertinent regulations of the State.

§ 676.13 -- Permits.

(a) General. (1) In addition to the permit and licensing requirements prescribed at 50 CFR parts 301, 672, 675, all fishing vessels that harvest IFQ halibut or IFQ sablefish must have onboard:

(i) A copy of an IFQ permit that specifies the IFQ regulatory area and vessel category in which IFQ halibut or IFQ sablefish may be harvested by the IFQ permit holder and a copy of the most recent accompanying statement specifying the amount of each species that may be harvested during the current IFQ fishing season; and

(ii) An original IFQ card issued by the Regional Director.

(2) Any person who receives IFQ halibut or IFQ sablefish from the person(s) that harvested the fish must possess a registered buyer permit, except under conditions of paragraphs (a)(2)(i), (ii), or (iii) of this section. A registered buyer permit also is required of any person who harvests IFQ halibut or IFQ sablefish and transfers such fish:

(i) In a dockside sale;

(ii) Outside of an IFQ regulatory area; or

(iii) Outside the State of Alaska.

(b) Issuance. (1) IFQ permits and cards will be renewed or issued annually by the Regional Director to each person with approved QS for IFQ halibut or IFQ sablefish allocated in accordance with § 676.20 of this part. Each IFQ permit issued by the Regional Director will identify the permitted person and will be accompanied by a statement that specifies the amount of IFQ halibut or IFQ sablefish that person may harvest from a specified IFQ regulatory area using fixed gear and a vessel of a specified vessel category. Each IFQ card issued by the Regional Director will display an IFQ permit number and the individual authorized by the IFQ permit holder to land IFQ halibut or IFQ sablefish for debit against the permit holder's IFQ.

(2) Registered buyer permits will be renewed or issued annually by the Regional Director to persons that have a registered buyer application approved by the Regional Director.

(c) Duration. (1) An IFQ permit authorizes the person identified on the

permit to harvest IFQ halibut or IFQ sablefish from a specified IFQ regulatory area at any time during an open fishing season during the fishing year for which the IFQ permit is issued until the amount harvested is equal to the [*59404] amount specified under the permit, or until it is revoked, suspended, or modified under 15 CFR part 904 (Civil Procedures). An IFQ card authorizes the individual identified on the card to land IFQ halibut or IFQ sablefish for debit against the specified IFQ permit until the card expires, or is revoked, suspended, or modified under 15 CFR part 904 (Civil Procedures), or cancelled on request of the IFQ permit holder.

(2) A registered buyer permit authorizes the person identified on the permit to receive or make an IFQ landing by an IFQ permit or card holder at any time during the fishing year for which it is issued until the registered buyer permit expires, or is revoked, suspended, or modified under 15 CFR part 904 (Civil Procedures)..

(d) Alteration. No person may alter, erase, or mutilate any IFQ permit or card or registered buyer permit issued under this section. Any such permit or card that has been intentionally altered, erased, or mutilated is invalid.

(e) Transfer. The IFQ permits issued under this section are not transferable except as provided under § 676.21 of this part. The IFQ cards and registered buyer permits issued under this section are not transferable.

(f) Inspection. (1) A legible copy of any IFQ permit issued under this section must be carried onboard the vessel used by the permitted person to harvest IFQ halibut or IFQ sablefish at all times that such fish are retained onboard. Except as specified in § 676.22(d) of this part, an individual that is issued an IFQ card must remain onboard the vessel used to harvest IFQ halibut or IFQ sablefish with that card until all such fish are landed, and must present a copy of the IFQ permit and the original IFQ card for inspection on request of any authorized officer, NMFS enforcement aide, or registered buyer.

(2) A legible copy of the registered buyer permit must be present at the location of an IFQ landing, and must be made available for inspection on request of any authorized officer or NMFS enforcement aide.

(g) Permit sanctions. Procedures governing permit sanctions and denials are found at 15 CFR part 904, subpart D.

§ 676.14 -- Recordkeeping and reporting.

In addition to the recordkeeping and reporting requirements specified in 50 CFR parts 301, 672, and 675, the following reports are required.

(a) Prior notice of IFQ landing. The operator of any vessel making an IFQ landing must notify the Alaska Region, NMFS, no less than 6 hours before landing IFQ halibut or IFQ sablefish, unless permission to commence an IFQ landing within 6 hours of notification is granted by an authorized enforcement officer. Such notification of IFQ landings must be made to the toll-free telephone number specified on the IFQ permit between the hours of 06:00 and 24:00 Alaska local time. The notification must include the name and location of the registered buyer(s) to whom the IFQ halibut or IFQ sablefish will be landed and the anticipated date and time of landing.

(b) IFQ landing report. Registered buyers must report their IFQ landings in the manner prescribed on the registered buyer permit within 6 hours after all such fish are landed and prior to shipment or departure of the delivery vessel from the landing site.

(1) IFQ landings may be made only between the hours of 06:00 and 18:00

Alaska local time unless permission to land at a different time is granted in advance by a NMFS enforcement officer or NMFS enforcement aide. An IFQ landing may continue after this time period if it was started during the period.

(2) All IFQ landings and all fish retained onboard the vessel making an IFQ landing are subject to verification, inspection, and sampling by authorized law enforcement officers, NMFS enforcement aides, or observers.

(3) Information contained in a complete IFQ landing report shall include the date, time, and location of the IFQ landing; the names and permit numbers of the IFQ card holder and registered buyer; the product type landed; and the fish product weight of sablefish and halibut landed.

(c) Shipment report. All registered buyers, other than those conducting dockside sales, must report their shipments or transfers of IFQ halibut and IFQ sablefish. A Shipment Report must be submitted for any shipment or transfer of IFQ halibut or IFQ sablefish to any location other than the location of the IFQ landing. Such reports must be submitted to the NMFS, Alaska Region, prior to shipment or transfer, in a manner prescribed on the registered buyer

permit. Shipment Reports must specify the species and product type being shipped, the number of shipping units, fish product weight, the name of the shipper and receiver, the name and address of the consignee and consignor, the mode of transportation, and the intended route.

(1) A registered buyer must assure that shipments of IFQ halibut or IFQ sablefish from that registered buyer in Alaska or in any IFQ regulatory area to a destination outside Alaska or outside an IFQ regulatory area do not commence until the Shipment Report is received by the Alaska Region, NMFS.

(2) A registered buyer must assure that a copy of the Shipment Report or a bill of lading that contains the same information accompanies the shipment to all points of sale in Alaska and to the first point of sale outside of Alaska.

(d) Dockside sales and outside landings. (1) A person holding a valid IFQ permit,. IFQ card, and registered buyer permit may conduct dockside sales of IFQ halibut or IFQ sablefish to persons who have not been issued registered buyer permits. The person making such an IFQ landing must submit an IFQ landing report in the manner prescribed in paragraph (b) of this section before any fish are sold,

transferred, or removed from the immediate vicinity of the vessel with which they were harvested. A receipt that includes the date of sale or transfer, the registered buyer permit number, and the fish product weight of the sablefish or halibut transferred must be issued to all individuals receiving IFQ halibut or IFQ sablefish through a dockside sale.

(2) A person holding a valid IFQ permit, IFQ card, and registered buyer permit may conduct IFQ landings outside of an IFQ regulatory area or the State of Alaska to a person who does not hold a registered buyer permit. The person making such an IFQ landing must submit an IFQ landing report in the manner prescribed in paragraph (b) of this section.

(e) Transshipment. No person may transship processed IFQ halibut or IFQ sablefish between vessels before providing at least 24-hours advance notification to a NMFS enforcement officer that such transshipment will occur. No person may transship processed IFQ halibut or IFQ sablefish between vessels at any location outside the boundaries of a primary port listed in § 676.17 of this part.

(f) A copy of all reports and receipts required by this section must be retained

by registered buyers and be made available for inspection by an authorized officer or NMFS enforcement aide for a period of 3 years.

§ 676.15 -- Vessel and gear identification.

Regulations pertaining to vessel and gear markings and limitations are set forth in 50 CFR part 301, 672.24, and 675.24.

§ 676.16 -- General prohibitions.

In addition to the prohibitions specified in §§ 620.7, 672.7, and 675.7 of this chapter, it is unlawful for any person to do any of the following:

(a) Fail to submit, or submit inaccurate information on, any report, [*59405] application, or statement required under this part;

(b) Intentionally submit false information on any report, application, or statement required under this part;

(c) Retain halibut or sablefish caught with fixed gear without a valid IFQ permit and without an IFQ card in the name of an individual onboard;

(d) Except as provided at § 676.17 of this part, retain IFQ halibut or IFQ sablefish on a vessel in excess of the total amount of unharvested IFQ, applicable to the vessel category and IFQ regulatory area in which the vessel is operating, and that is currently held by all IFQ card holders onboard the vessel;

(e) Possess, buy, sell, or transport IFQ halibut or IFQ sablefish harvested or landed in violation of any provision of this part;

(f) Make an IFQ landing without an IFQ card in the name of the individual making the landing;

(g) Possess on a vessel or land IFQ sablefish concurrently with non-IFQ sablefish, except that CDQ sablefish may be possessed on a vessel and landed concurrently with IFQ sablefish;

(h) Discard Pacific cod or rockfish that are taken when IFQ halibut or IFQ sablefish are onboard unless Pacific cod or rockfish are required to be discarded under §§ 672.20 or 675.20 of this chapter or unless, in waters within the State of Alaska, Pacific cod or rockfish are required to be discarded by laws of the State of Alaska;

(i) Transfer QS or IFQ (other than by operation of law) without the prior written approval of the Regional Director;

(j) Harvest on any vessel more IFQ halibut or IFQ sablefish than are authorized under § 676.22 of this part;

(k) Make an IFQ landing other than directly to (or by) a registered buyer;

(l) Discard halibut or sablefish caught with fixed gear from any catcher vessel when any IFQ card holder onboard holds unused halibut or sablefish IFQ for that vessel category and the IFQ regulatory area in which the vessel is operating unless discard:

(1) Of halibut is required under 50 CFR part 301;

(2) Of sablefish is required under 50 CFR 672.20 or 675.20 or, in waters within the State of Alaska, discard of sablefish is required under laws of the State of Alaska; or

(3) Of halibut or sablefish is required under other provisions of this part;

(m) Make an IFQ landing without prior notice of landing and before 6 hours

after such notice, except as provided at § 676.14(a) of this part;

(n) Sell or otherwise transfer catcher vessel IFQ except as provided at § 676.21 of this part;

(o) Operate a vessel as catcher vessel and a freezer vessel during the same fishing trip;

(p) Participate in a Western Alaska Community Development Quota program in violation of § 676.24 of this part, submit information that is false or inaccurate with a CDP application or request for an amendment, or exceed a CDQ as defined at § 676.11 of this part; and

(q) Violate any other provision of this part.

§ 676.17 -- Facilitation of enforcement and monitoring.

In addition to the requirements of §§ 620.8 and 676.14 of this chapter, an IFQ landing must comply with the provisions described in this section.

(a) Vessel clearance. Any person that makes an IFQ landing at any location other than in an IFQ regulatory area or in the State of Alaska must be a registered buyer, obtain pre-landing

written clearance of the vessel on which the IFQ halibut or IFQ sablefish are transported to the IFQ landing location, and provide an estimated weight of IFQ halibut and IFQ sablefish onboard to the clearing officer. For vessels obtaining clearance at a port in Alaska, clearance must be obtained prior to departing waters in or adjacent to the State of Alaska. For vessels obtaining clearance at a port in Washington or another state, the vessel must report to NMFS, Alaska Region, the estimated weight of the IFQ halibut and IFQ sablefish onboard and the intended date and time the vessel will obtain clearance at the port in Washington or another state. Such reports must be submitted to NMFS, Alaska Region, prior to departing waters in or adjacent to the State of Alaska, and in the manner prescribed by the registered buyer permit.

(1) Any person requesting a vessel clearance must have valid IFQ and registered buyer permits and one or more valid IFQ cards onboard that indicate that IFQ holdings are equal to or greater than all IFQ halibut and IFQ sablefish onboard, and must report the intended date, time, and location of IFQ landing.

(2) Any person granted a vessel clearance must submit an IFQ landing report, required under § 676.14 of this

part, for all IFQ halibut, IFQ sablefish, and products thereof that are onboard the vessel at the first landing of any fish from the vessel.

(3) A vessel seeking clearance is subject to inspection of all fish, log books, permits, and other documents onboard the vessel, at the discretion of the clearing officer.

(4) Unless specifically authorized on a case-by-case basis, vessel clearances will be issued only by NMFS enforcement officers at any of the following primary ports (geographic location descriptions reserved):

Akutan

Bellingham

Cordova

Craig

Dutch Harbor/Unalaska

Excursion Inlet

Homer

Ketchikan

King Cove

Kodiak

Pelican

Petersburg

St. Paul

Sand Point

Seward

Sitka

Yakutat

(b) Overages. Any person allocated IFQ must not harvest halibut or sablefish using fixed gear in any amount greater than the amount indicated under that person's current IFQ permit. Any person that harvests IFQ halibut or IFQ sablefish must hold sufficient unused IFQ for the harvest before beginning a fishing trip. Any IFQ halibut or IFQ sablefish that is harvested or landed in excess of a specified IFQ will be considered an "IFQ overage." In addition to any penalties that may be assessed for exceeding an IFQ, the Regional Director will deduct an amount equal to the overage from IFQ allocated in the year following determination of the overage. This overage adjustment to the annual IFQ

allocation will be specific to each IFQ regulatory area for which an IFQ is calculated, and will apply to any person to whom the affected IFQ is allocated in the year following determination of an overage. In addition, the landed value of overages of the amount specified under the IFQ permit of 5 percent or more shall be subject to forfeiture. Unharvested amounts of IFQ in any year or IFQ regulatory area will not be reallocated.

§ 676.18 -- Penalties.

Any person committing, or a fishing vessel used in the commission of, a violation of the Magnuson Act or Halibut Act or any regulation issued under the Magnuson Act or Halibut Act, is subject to the civil and criminal penalty provisions and civil forfeiture provisions of the Magnuson Act or Halibut Act, to part 621 of this chapter, to 15 CFR part 904 (Civil Procedures), and to other applicable law. Penalties include but are not limited to [*59406] permanent or temporary sanctions to QS and associated IFQ.

Subpart C-Individual Fishing Quota Management Measures

§ 676.20 -- Individual allocations.

The Regional Director shall annually divide the total allowable catch of halibut and sablefish that is apportioned to the fixed gear fishery pursuant to 50 CFR part 301, 672.20 and 675.20, minus the CDQ reserve, among qualified halibut and sablefish quota shareholders, respectively.

(a) Initial allocation of quota share (QS). The Regional Director shall initially assign to qualified persons halibut and sablefish fixed gear fishery QS that are specific to IFQ regulatory areas and vessel categories.

(1) Qualified person. As used in this section, a "qualified person" means a "person," as defined in § 676.11 of this part, that owned a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year. A person is a qualified person also if (s)he leased a vessel that made legal landings of halibut or sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year. A person who owns a vessel cannot be a qualified person based on the legal fixed gear landings of halibut or sablefish made by a person who leased the vessel for the duration of the lease. Qualified persons, or their

successors-in-interest, must exist at the time of their application for QS. A former partner of a dissolved partnership or a former shareholder of a dissolved corporation who would otherwise qualify as a person may apply for QS in proportion to his interest in the dissolved partnership or corporation. Sablefish harvested within Prince William Sound, or under a State of Alaska limited entry program, will not be considered in determining whether a person is a qualified person.

(i) A QS qualifying year is 1988, 1989, or 1990.

(ii) Evidence of vessel ownership shall be limited to the following documents, in order of priority:

(A) For vessels required to be documented under the laws of the United States, the U.S. Coast Guard abstract of title issued in respect of that vessel;

(B) A certificate of registration that is determinative as to vessel ownership; and

(C) A bill of sale.

(iii) Evidence of a vessel lease shall be limited to a written vessel lease agreement or a notarized statement from

the vessel owner and lease holder attesting to the existence of a vessel lease agreement at any time during the QS qualifying years. Evidence of a vessel lease must identify the leased vessel and indicate the name of the lease holder and the period of time during which the lease was in effect.

(iv) Evidence of ownership interest in a dissolved partnership or corporation shall be limited to corporate documents (e.g., articles of incorporation) or notarized statements signed by each former partner, shareholder or director, and specifying their proportions of interest.

(v) As used in this section, a "legal landing of halibut or sablefish" means halibut or sablefish harvested with fixed gear and landed in compliance with state and Federal regulations in effect at the time of the landing. Evidence of legal landings shall be limited to documentation of state or Federal catch reports that indicate the amount of halibut or sablefish harvested, the IPHC regulatory area or groundfish reporting area in which it was caught, the vessel and gear type used to catch it, and the date of harvesting, landing, or reporting. State catch reports are Alaska, Washington, Oregon, or California fish tickets. Federal catch reports are

weekly production reports required under §§ 672.5(c) and 675.5(c) of this chapter. Sablefish harvested within Prince William Sound, or under a State of Alaska limited entry program, will not be considered in determining qualification to receive QS, nor in calculating initial QS.

(2) Vessel categories. Vessel categories include:

(i) Category A-freezer vessels of any length;

(ii) Category B-catcher vessels greater than 60 feet (18.3 meters) in length overall;

(iii) Category C-catcher vessels less than or equal to 60 feet (18.3 meters) in length overall for sablefish, or catcher vessels greater than 35 feet (10.7 meters) but less than or equal to 60 feet (18.3 meters) in length overall for halibut; and

(iv) Category D-catcher vessels that are less than or equal to 35 feet (10.7 meters) in length overall for halibut.

(b) Calculation of initial QS. The Regional Director shall calculate the halibut QS for any qualified person in each IFQ regulatory area based on that person's highest total legal landings of

halibut in each IPHC regulatory area for any 5 years of the 7-year halibut QS base period 1984 through 1990. The Regional Director shall calculate the sablefish QS for any qualified person in each IFQ regulatory area based on that person's highest total legal landings of sablefish in each groundfish reporting area for any 5 years of the 6-year sablefish QS base period 1985 through 1990. The sum of all halibut QS for an IFQ regulatory area will be the halibut QS pool for that area. The sum of all sablefish QS for an IFQ regulatory area will be the sablefish QS pool for that area. Each initial QS calculation will be modified to accommodate the CDQ program prescribed at § 676.24 of this part.

(c) Assignment of QS to vessel categories. Each qualified person's QS will be assigned to a vessel category based on the length overall of vessel(s) from which that person made fixed gear legal landings of groundfish or halibut in the most recent year of participation and the product type landed. As used in this paragraph, "the most recent year of participation" means the most recent of four calendar years in which any groundfish or halibut were harvested using fixed gear, as follows: Calendar year 1988, 1989, or 1990; or calendar year 1991 prior to September 26, 1991.

(1) A qualified person's QS will be assigned to vessel category "A" if, at any time during his/her most recent year of participation, that person's vessel processed any groundfish or halibut caught with fixed gear.

(2) A qualified person's QS will be assigned to vessel category "B" if, at any time during his/her most recent year of participation, that person's vessel was greater than 60 feet (18.3 meters) in length overall and did not process any groundfish or halibut caught with fixed gear.

(3) A qualified person's sablefish QS will be assigned to vessel category "C" if, at any time during his/her most recent year of participation, that person's vessel was less than or equal to 60 feet (18.3 meters) in length overall and did not process any groundfish or halibut caught with fixed gear.

(4) A qualified person's halibut QS will be assigned to vessel category "C" if, at any time during his/her most recent year of participation, that person's vessel was less than or equal to 60 feet (18.3 meters), but greater than 35 feet (10.7 meters), in length overall and did not process any groundfish or halibut caught with fixed gear.

(5) A qualified person's halibut QS will be assigned to vessel category "D" if, at any time during his/her most recent year of participation, that person's vessel was less than or equal to 35 feet (10.7 meters) in length overall and did not process any groundfish or halibut caught with fixed gear.

(6) A qualified person's QS will be assigned to each applicable vessel category in proportion to the landings of [*59407] halibut or sablefish made by that person if, at any time during their most recent year of participation, that person used more than one vessel in different categories.

(7) A qualified person's QS for both species will be assigned to the vessel category in which groundfish were landed in the most recent year of participation if, at any time during that year, that person landed halibut in one vessel category and sablefish in a different vessel category.

(8) A qualified person's halibut QS will be assigned to the vessel category in which groundfish were landed, or vessel categories in proportion to the total fixed gear landings of groundfish, if, at any time during the most recent year of participation, that person's

vessel(s) makes no landing(s) of halibut.

(9) A qualified person's sablefish QS will be assigned to the vessel category in which halibut and groundfish were landed, or vessel categories in proportion to the total fixed gear landings of halibut and groundfish, if, at any time during the most recent year of participation, that person's vessel(s) makes no landing(s) of sablefish.

(d) Application for initial QS. Upon request, the Regional Director shall make available to any person an application form for an initial allocation of QS. The application form sent to the person requesting a QS allocation will include all data on that person's vessel ownership and catch history of halibut and sablefish that can be released to the applicant under current state and Federal confidentiality rules, and that are available to the Regional Director at the time of the request. An application period of no less than 180 days will be specified by notice in the Federal Register and other information sources that the Regional Director deems appropriate. Complete applications received by the Regional Director will be acknowledged. An incomplete application will be returned to the applicant with

specific kinds of information identified that are necessary to make it complete.

(1) Halibut and sablefish catch history, vessel ownership or lease data, and other information supplied by an applicant will be compared with data compiled by the Regional Director. If additional data presented in an application are not consistent with the data compiled by the Regional Director, the applicant will be notified of insufficient documentation. The applicant will have 90 days to submit corroborating documents (as specified at paragraph (a)(1) of this section) in support of his/her application or to resubmit a revised application. All applicants will be limited to one opportunity to provide corroborating documentation or a revised application in response to a notice of insufficient documentation.

(2) Uncontested data in applications will be approved by the Regional Director. Based on these data, the Regional Director will calculate each applicant's initial halibut and sablefish QS, as provided at paragraph (b) of this section, for each IFQ regulatory area, respectively, and will add each applicant's halibut and sablefish QS for an IFQ regulatory area to the respective QS pool for that area.

(3) Any applicant's catch history or other data that are contested by the Regional Director or another applicant will prevent approval of QS amounts that would result from the contested data until discrepancies are resolved. Amounts of QS will not be added to the QS pool for any IFQ regulatory area until they are approved by the Regional Director.

(e) Appeal of initial allocation. Initial action on allocation of QS must be appealed, pursuant to § 676.25 of this part, within 90 days of the date any allocation is issued or denied following the process described in paragraph (d) of this section.

(f) Annual allocation of IFQ. The Regional Director shall assign halibut or sablefish IFQs to each person holding approved halibut or sablefish QS, respectively, up to the limits prescribed at § 676.22 (e) and (f) of this part. Each assigned IFQ will be specific to an IFQ regulatory area and vessel category, and will represent the maximum amount of halibut or sablefish that may be harvested from the specified IFQ regulatory area and by the person to whom it is assigned during the specified fishing year, unless the IFQ assignment is changed by the Regional Director within the fishing year because of an approved transfer or because all or part

of the IFQ is sanctioned for violating rules of this part.

(1) The annual allocation of IFQ to any person (person p) in any IFQ regulatory area (area a) will be equal to the product of the total allowable catch of halibut or sablefish by fixed gear for that area (after adjustment for purposes of the Western Alaska Community Development Quota Program) and that person's QS divided by the QS pool for that area. Overages will be subtracted from a person's IFQ pursuant to § 676.17 of this part. Expressed algebraically, the annual IFQ allocation formula is as follows:

IFQ sub pa = [(fixed gear TAC sub a-CDQ reserve sub a) x (QS sub pa/QS pool sub a)]-overage of IFQ sub pa.

(2) For purposes of calculating IFQs for any fishing year, the amount of a person's QS and the amount of the QS pool for any IFQ regulatory area will be the amounts on record with the Alaska Region, NMFS, as of noon, Alaska local time, on January 31 of that year.

(3) The Regional Director shall issue to each QS holder, pursuant to § 676.13 of this part, an IFQ permit accompanied by a statement specifying the maximum amount of halibut and sablefish that may

be harvested with fixed gear in a specified IFQ regulatory area and vessel category as of January 31 of that year. Such IFQ permits will be sent by certified mail to each QS holder at the address on record for that person after the beginning of each fishing year but prior to the start of the annual IFQ fishing season.

(g) Quota shares allocated or permits issued pursuant to this part do not represent either an absolute right to the resource or any interest that is subject to the "takings" provision of the Fifth Amendment of the U.S. Constitution. Rather, such quota shares or permits represent only a harvesting privilege that may be revoked or amended subject to the requirements of the Magnuson Fishery Conversation and Management Act and other applicable law.

§ 676.21 -- Transfer of QS and IFQ.

Any person that is allocated QS or IFQ, either initially or by subsequent approved transfer, may sell, lease, or otherwise transfer all or part of their QS or IFQ to another person only in accordance with the transfer restrictions and procedures described in this section.

(a) The QS and IFQ assigned to any vessel category is not transferrable to any other vessel category.

(b) The QS assigned to any catcher vessel category may be transferred only to individuals who are U.S. citizens and IFQ crew members or to persons that receive an initial allocation of catcher vessel QS, except that only individuals may receive transferred catcher vessel QS for halibut in IFQ regulatory area 2C or for sablefish in the IFQ regulatory area east of 140 degrees west longitude. An initial allocation of catcher vessel QS to an individual may be transferred to a solely-owned corporation that is owned by the same individual.

(c) The Regional Director must be notified of any transfer of QS or IFQ by inheritance, court order, security agreement, or other operation of law. Any person that receives QS in this [*59408] manner may not use the IFQ resulting from it to harvest halibut or sablefish with fixed gear without first obtaining the approval of the Regional Director under paragraph (e) of this section. Any person that receives QS in this manner may apply to transfer QS to an eligible applicant subject to the transfer restrictions and procedures described in this section.

(d) Transfers of catcher vessel QS approved by the Regional Director cannot be made subject to a lease or any condition of repossession or resale by the person transferring QS except as provided for leasing in paragraph (f) of this section or by court order or as part of a security agreement. The Regional Director may request a copy of the sales contract or other terms and conditions of transfer between two persons as supplementary information to the transfer application.

(e) Transfer procedure. The transfer of QS or IFQ shall not be effective for purposes of harvesting halibut or sablefish with fixed gear until a transfer application is approved by the Regional Director. The Regional Director shall provide a transfer application form to any person on request. Approved transfers will change the affected persons' QS or IFQ accounts on the date of approval, and the persons applying for transfer will be given notice of the transfer approval, and IFQ permits if necessary, by mail posted on the date of approval unless another communication mode is requested on the transfer application. Applicants whose transfers were not approved will be similarly informed of the reason for disapproval.

(1) Transfer approval criteria. A transfer of QS or IFQ for purposes of harvesting halibut or sablefish with fixed gear will not be approved until the Regional Director has determined that:

(i) The person who is applying to transfer QS or IFQ is the same person who received the QS or IFQ either by initial allocation or subsequent approved transfer, or is a person who legally acquired the QS through inheritance, court order, security agreement, or other operation of law;

(ii) The person applying to receive transferred QS or IFQ has a transfer eligibility application, containing currently accurate information, approved by the Regional Director;

(iii) The proposed transfer will not cause the person who would receive QS to exceed the use limits specified at § 676.22 of this part;

(iv) Both persons have their notarized signatures on the transfer application form, unless the transfer is by inheritance, court order, security agreement, or other operation of law;

(v) There are no fines, civil penalties, or other payments due and owing or outstanding permit sanctions

resulting from Federal fishery violations involving either person;

(vi) The person applying to receive transferred QS or IFQ currently exists; and

(vii) Other pertinent information requested on the transfer application form has been supplied to the satisfaction of the Regional Director.

(2) Transfer eligibility application. All persons who apply to receive QS or IFQ by transfer must have a transfer eligibility application, containing currently accurate information, approved by the Regional Director. The Regional Director shall provide a transfer eligibility application form to any person on request. Applicants may request either an Individual IFQ Crew Member Eligibility Application or a Corporate/Partnership or Other Entity Eligibility Application. Persons who are not individuals must resubmit a transfer eligibility application if there is a change in the corporation or partnership as described in § 676.22 of this part. Approved transfer eligibility applicants will be informed by certified mail of their transfer eligibility. A disapproved transfer eligibility application will be returned to the applicant with an explanation of why the application was

disapproved. Reasons for disapproval of a transfer eligibility application may include, but are not limited to:

(i) Fewer than 150 days of experience working as an IFQ crew member;

(ii) Lack of compliance with the U.S. citizenship or corporate ownership requirements specified by the definition of "person" at § 676.11 of this part;

(iii) An incomplete eligibility application; or

(iv) Fines, civil penalties, or other payments due and owing or outstanding permit sanctions resulting from Federal fishery violations.

(f) Leasing QS (applicable until January 2, 1997). A person may transfer by lease no more than 10 percent of his/her total catcher vessel QS for any IFQ regulatory area to one or more other persons for any fishing year. A QS lease shall not have effect until approved by the Regional Director. The Regional Director shall change QS or IFQ accounts affected by an approved QS lease transfer and issue any necessary IFQ permits. Approved QS leases must comply with all transfer requirements specified in this section. Applications to transfer by lease QS that is under sanction will not

be approved. All lease transfers will cease to have effect on December 31 of the year for which they are approved.

§ 676.22 -- Limitations on use of QS and IFQ.

(a) The QS or IFQ specified for one IFQ regulatory area and one vessel category must not be used in a different IFQ regulatory area or vessel category, except as provided in paragraph (i)(3) of this section.

(b) Halibut IFQ must be used only to harvest halibut with fishing gear authorized at 50 CFR part 301. Sablefish fixed gear IFQ must not be used to harvest sablefish with trawl gear in any IFQ regulatory area, or with pot gear in any IFQ regulatory area of the Gulf of Alaska.

(c) Any individual who harvests halibut or sablefish with fixed gear must:

(1) Have a valid IFQ card;

(2) Be aboard the vessel at all times during fishing operations; and

(3) Sign any required fish ticket or IFQ landing report for the amount of halibut or sablefish that will be debited

against the IFQ associated with their IFQ card.

(d) The requirement of paragraph (c) of this section for an individual IFQ card holder to be onboard during fishing operations and to sign the IFQ landing report may be waived in the event of extreme personal emergency involving the IFQ user during a fishing trip. The waiving of these requirements shall apply only to IFQ halibut or IFQ sablefish retained on the fishing trip during which such emergency occurred.

(e) Sablefish QS use. No person, individually or collectively, may use an amount of sablefish QS greater than 1 percent (0.01) of the combined total sablefish QS for the Gulf of Alaska and Bering Sea and Aleutian Islands IFQ regulatory areas, unless the amount in excess of 1 percent (0.01) was received in the initial allocation of QS. In the IFQ regulatory area east of 140 degrees west longitude, no person, individually or collectively, may use more than 1 percent (0.01) of the total amount of QS for this area, unless the amount in excess of 1 percent (0.01) was received in the initial allocation of QS.

(f) Halibut QS use. Unless the amount in excess of the following limits was received in the initial allocation of

halibut QS, no person, individually or collectively, may use more than:

(1) One percent (0.01) of the total amount of halibut QS for IFQ regulatory area 2C;

(2) One-half percent (0.005) of the total amount of halibut QS for IFQ regulatory areas 2C, 3A, and 3B, combined; and

(3) One-half percent (0.005) of the total amount of halibut QS for IFQ regulatory areas 4A, 4B, 4C, 4D, and 4E, combined. [*59409]

(g) If transferred QS would result in an IFQ that is greater than the use limits specified in paragraphs (e) and (f) of this section, then any necessary adjustment to the IFQ account based on such QS will be issued for only the maximum IFQ allowed under these limits.

(h) Vessel limitations. (1) No vessel may be used, during any fishing year, to harvest more than one-half percent (0.005) of the combined total catch limits of halibut for IFQ regulatory areas 2C, 3A, 3B, 4A, 4B, 4C, 4D, and 4E, except that, in IFQ regulatory area 2C, no vessel may be used to harvest more than 1 percent (0.01) of the halibut catch limit for this area; and

(2) No vessel may be used, during any fishing year, to harvest more than 1 percent (0.01) of the combined fixed gear TAC of sablefish for the Gulf of Alaska and Bering Sea and Aleutian Islands IFQ regulatory areas, except that, in the IFQ regulatory area east of 140 degrees west longitude, no vessel may be used to harvest more than 1 percent (0.01) of the fixed gear TAC of sablefish for this area.

(3) A person who receives an approved IFQ allocation of halibut or sablefish in excess of these limitations may nevertheless catch and retain all of that IFQ with a single vessel. However, two or more persons may not catch and retain their IFQs with one vessel in excess of these limitations.

(i) Use of catcher vessel IFQ. In addition to the requirements of paragraph (c) of this section, catcher vessel IFQ cards must be used only by the individual who holds the QS from which the associated IFQ is derived, except as provided in paragraph (i)(1) of this section.

(1) An individual who receives an initial allocation of catcher vessel QS does not have to be onboard and sign IFQ landing reports if that individual owns

the vessel on which IFQ sablefish or halibut are harvested, and is represented on the vessel by a master employed by the individual who received the initial allocation of QS.

(2) The exemption provided in paragraph (i)(1) of this section does not apply to individuals who receive an initial allocation of catcher vessel QS for halibut in IFQ regulatory area 2C or for sablefish QS in the IFQ regulatory area east of 140 degrees west longitude, and this exemption is not transferable.

(3) Catcher vessel IFQ may be used on a freezer vessel, provided no frozen or otherwise processed fish products are onboard at any time during a fishing trip on which catcher vessel IFQ is being used. A catcher vessel may not land any IFQ species as frozen or otherwise processed product. Processing of fish on the same vessel that harvested those fish using catcher vessel QS is prohibited.

(j) Use of catcher vessel IFQ by corporations and partnerships. A corporation or partnership that receives an initial allocation of catcher vessel QS may use the IFQ resulting from that QS and any additional QS acquired within the limitations of this section provided the corporation or partnership owns the vessel on which its IFQ is used, and it

is represented on the vessel by a master employed by the corporation or partnership that received the initial allocation of QS. This provision is not transferable and does not apply to catcher vessel QS for halibut in IFQ regulatory area 2C or for sablefish in the IFQ regulatory area east of 140 degrees west longitude that is transferred to a corporation or partnership. Such transfers of additional QS within these areas must be to an individual pursuant to § 676.21(b) of this part and be used pursuant to paragraphs (c) and (i) of this section.

(1) A corporation or partnership, except for a publicly-held corporation, that receives an initial allocation of catcher vessel QS loses the exemption provided under paragraph (j) of this section on the effective date of a change in the corporation or partnership from that which existed at the time of initial allocation.

(2) For purposes of this paragraph, "a change in the corporation or partnership" means the addition of any new shareholder(s) or partner(s), except that a court appointed trustee to act on behalf of a shareholder or partner who becomes incapacitated is not a change in the corporation or partnership.

(3) The Regional Director must be notified of a change in a corporation or partnership as defined in this paragraph within 15 days of the effective date of the change. The effective date of change, for purposes of this paragraph, is the date on which the new shareholder(s) or partner(s) may realize any corporate liabilities or benefits of the corporation or partnership.

(4) Catcher vessel QS and IFQ resulting from that QS held in the name of a corporation or partnership that changes, as defined in this paragraph, must be transferred to an individual, as prescribed in § 676.21 of this part, before it may be used at any time after the effective date of the change.

§ 676.23 -- IFQ fishing season.

(a) The fishing period(s) for IFQ halibut are established by the IPHC and are specified at 50 CFR part 301. Catches of halibut by fixed gear at times other than during the specified fishing periods must be treated as prohibited species as prescribed at §§ 672.20(e) and 675.20(c) of this chapter.

(b) Directed fishing for sablefish using fixed gear in any IFQ regulatory area may be conducted at any time during the period from 00:01 Alaska Local Time

on March 1 through 24:00 Alaska Local Time on November 30. Catches of sablefish by fixed gear during other periods may be retained up to the directed fishing standards specified at §§ 672.20(g) and 675.20(h) of this chapter if an individual who holds a valid IFQ card and unused IFQ is onboard when the catch is made. Catches of sablefish in excess of the directed fishing standards and catches made without IFQ must be treated in the same manner as prohibited species.

§ 676.24 -- Western Alaska Community Development Quota Program.

(a) Halibut CDQ Program. The Secretary will annually withhold from IFQ allocation the proportions of the halibut catch limit that are specified in this paragraph for use as a CDQ. Portions of the CDQ for each specified IPHC regulatory area may be allocated for the exclusive use of an eligible western Alaska community in accordance with a CDP approved by the Governor in consultation with the Council and approved by the Secretary. The proportions of the halibut catch limit annually withheld for purposes of the CDQ program, exclusive of issued QS, are as follows for each area:

(1) In IPHC regulatory area 4B, 20 percent of the annual halibut quota shall

be made available for the halibut CDQ program to eligible communities physically located in or proximate to this regulatory area. For the purposes of this section, "proximate to" an IPHC regulatory area means within 10 nautical miles from the point where the boundary of the IPHC regulatory area intersects land.

(2) In IPHC regulatory area 4C, 50 percent of the halibut quota shall be made available for the halibut CDQ program to eligible communities physically located in IPHC regulatory area 4C.

(3) In IPHC regulatory area 4D, 30 percent of the halibut quota shall be made available for the halibut CDQ program to eligible communities located in or proximate to IPHC regulatory areas 4D and 4E.

(4) In IPHC regulatory area 4E, 100 percent of the halibut quota shall be made available for the halibut CDQ program to communities located in or proximate to IPHC regulatory area 4E. A trip limit of 6,000 pounds (2.7 metric tons) will apply to halibut CDQ harvesting in IPHC regulatory area 4E. [*59410]

(b) Sablefish CDQ Program. In the notices of proposed and final harvest limit specifications required under § 675.20(a) of this chapter, the Secretary will specify 20 percent of the fixed gear allocation of sablefish in each Bering Sea and Aleutian Islands subarea, as provided under § 675.24(c) of this chapter, as a sablefish CDQ reserve, exclusive of issued QS. Portions of the CDQ reserve for each subarea may be allocated for the exclusive use of specific western Alaska communities in accordance with CDPs approved by the Governor in consultation with the Council and approved by the Secretary. The Secretary will allocate no more than 12 percent of the total CDQ for all subareas combined to any one applicant with an approved CDQ application.

(c) State of Alaska CDQ responsibilities. Prior to granting approval of a CDP recommended by the Governor, the Secretary shall find that the Governor approved the CDP after conducting at least one public hearing, at an appropriate time and location in the geographical area concerned, so as to allow all interested persons an opportunity to be heard. The hearing(s) on the CDP do not have to be held on the actual documents submitted to the Governor under paragraph (d) of this section. Such hearing(s) must cover the

substance and content of the proposed CDP in such a manner that the general public and the affected parties have a reasonable opportunity to understand the impact of the CDP. The Governor must provide reasonable public notice of hearing date(s) and location(s). The Governor must make available for public review, at the time of public notice of the hearing, all materials in possession of the State of Alaska that are pertinent to the hearing(s) and that may be released under State and Federal confidentiality laws. The Governor must include a transcript or summary of the public hearing(s) with the Governor's recommendations to the Secretary in accordance with this section. At the same time this transcript is submitted to the Secretary, it must be made available, upon request, to the public. The public hearing held by the Governor will serve as the public hearing for purposes of Secretarial review under paragraph (e) of this section.

(d) CDP application. The Governor, after consultation with the Council, shall include in his written findings to the Secretary recommending approval of a sablefish/halibut CDP, that the CDP meets the requirements of these regulations, the Magnuson Act, the Alaska Coastal Management Program, and other applicable law. At a minimum, the submission must

discuss the determination of a community as eligible; information regarding community development, including goals and objectives; business information; and a statement of the managing organization's qualifications. For purposes of this section, an eligible community includes any community or group of communities that meets the criteria set out in paragraph (f)(2) of this section. Applications for a CDP must include the following information:

(1) Community development information. Community development information includes:

(i) The goals and objectives of the CDP;

(ii) The allocation of sablefish or halibut CDQ requested for each subarea defined at § 675.2 of this chapter and for each IPHC regulatory area;

(iii) The length of time the CDQ allocation will be necessary to achieve the goals and objectives of the CDP, including a project schedule with measurable milestones for determining progress;

(iv) The number of individuals to be employed under the CDP, the nature of the work provided, the number of

employee-hours anticipated per year, and the availability of labor from the applicant's community(ies);

(v) Description of the vocational and educational training programs that a CDQ allocation under the CDP would generate;

(vi) Description of existing fishery-related infrastructure and how the CDP would use or enhance existing harvesting or processing capabilities, support facilities, and human resources;

(vii) Description of how the CDP would generate new capital or equity for the applicant's fishing or processing operations;

(viii) A plan and schedule for transition from reliance on the CDQ allocation under the CDP to self-sufficiency in fisheries; and

(ix) A description of short-term and long-term benefits to the applicant from the CDQ allocation.

(2) Business information. Business information includes:

(i) Description of the intended method of harvesting the CDQ allocation, including the types of products to be produced; amounts to be harvested; when,

where, and how harvesting is to be conducted; and names and permit numbers of the vessels that will be used to harvest the CDQ allocation;

(ii) Description of the target market for sale of products and competition existing or known to be developing in the target market;

(iii) Description of business relationships between all business partners (i.e., persons who have a financial interest in the CDQ project), if any, including arrangements for management, audit control, and a plan to prevent quota overages;

(iv) Description of profit sharing arrangements;

(v) Description of all funding and financing plans;

(vi) Description of joint venture arrangements, loans, or other partnership arrangements, including the distribution of proceeds among the parties;

(vii) A budget for implementing the CDP;

(viii) A list of all capital equipment;

(ix) A cash flow and break-even analysis; and

(x) A balance sheet and income statement, including profit, loss, and return on investment on all business ventures within the previous 12 months by the applicant and/or the managing organization.

(3) Statement of managing organization's qualifications.

(i) Statement of the managing organization's qualifications includes information regarding its management structure and key personnel, such as resumes and references;

(ii) Description of how the managing organization is qualified to manage a CDQ allocation and prevent quota overages; For purposes of this section, a qualified managing organization means any organization or firm that would assume responsibility for managing all or part of the CDP and would meet the following criteria:

(A) Documentation of support from each community represented by the applicant for a CDP through an official letter of support approved by the governing body of the community;

(B) Documentation of a legal relationship between the CDP applicant and the managing organization that clearly describes the responsibilities and obligations of each party as demonstrated through a contract or other legally binding agreement; and

(C) Demonstration of management and technical expertise necessary to carry out the CDP as proposed by the CDP application (e.g., proven business experience as shown by a balance and income statement, including profit, loss, and the return on investment on all business ventures within the previous 12 months by the management organization).

(e) Secretarial review and approval of CDPs. (1) Upon receipt by the Secretary of the Governor's recommendation for approval of proposed CDPs, the Secretary will review the record to determine whether the community [*59411] eligibility criteria and the evaluation criteria set forth in paragraph (f) of this section have been met. The Secretary shall then approve or disapprove the Governor's recommendation within 45 days of its receipt. In the event of approval, the Secretary shall notify the Governor and the Council in writing that the Governor's recommendations for CDPs are consistent with the community eligibility conditions and evaluation criteria under

paragraph (f) of this section and other applicable law, including the Secretary's reasons for approval. Publication of the decision, including the percentage of the sablefish and halibut CDQ reserves allocated to each CDP, and the availability of the findings will appear in the Federal Register. The Secretary will allocate no more than 12 percent of the sablefish CDQ reserve to any one applicant with an approved CDP. A community may not concurrently receive more than one halibut CDQ or more than one sablefish CDQ, and only one application for each type of CDP per community will be accepted.

(2) If the Secretary finds that the Governor's recommendations for halibut and sablefish CDQ allocations are not consistent with the criteria set forth in these regulations and disapproves the Governor's recommendations, the Secretary shall so advise the Governor and the Council in writing, including the reasons therefor. Publication of the decision will appear in the Federal Register. The CDP applicant may submit a revised CDP to the Governor for submission to the Secretary. Review by the Secretary of a revised CDP application will be in accordance with the provisions set forth in this section.

(f) Evaluation criteria. The Secretary will approve the Governor's recommendations for halibut and sablefish CDPs if the Secretary finds the CDPs are consistent with the requirements of this part, including the following:

(1) Each CDP application is submitted in compliance with the application procedures described in paragraph (d) of this section;

(2) Prior to approval of a CDP recommended by the Governor, the Secretary will review the Governor's findings as to how each community(ies) meet the following criteria for an eligible community in paragraphs (f)(2)(i), (ii), (iii), and (iv) of this section. The Secretary has determined that the communities listed in Table 1 of this section meet these criteria; however, communities that may be eligible to submit CDPs and receive halibut or sablefish CDQs are not limited to those listed in this table. For a community to be eligible,. it must meet the following criteria:

(i) The community must be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the most western of the Aleutian

Islands, or on an island within the Bering sea. A community is not eligible if it is located on the coast of the Chukchi Sea or the Gulf of Alaska even if it is within 50 nautical miles of the baseline of the Bering Sea;

(ii) The community must be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a native village;

(iii) The residents of the community must conduct more than one-half of their current commercial or subsistence fishing effort in the waters surrounding the community; and

(iv) The community must not have previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, except if the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The communities of Unalaska and Akutan are excluded under this provision;

(3) Each CDP application demonstrates that a qualified managing organization will be responsible for the harvest and

use of the CDQ allocation pursuant to the CDP;

(4) Each CDP application demonstrates that its managing organization can effectively prevent exceeding the CDQ allocation;

(5) The Governor has found for each recommended CDP that:

(i) The CDP and the managing organization are fully described in the CDQ application, and have the ability to successfully meet the project milestones and schedule;

(ii) The managing organization has an adequate budget for implementing the CDP, and that the CDP is likely to be successful;

(iii) A qualified applicant has submitted the CDP application and that the applicant and managing organization have the support of each community participating in the proposed CDQ project as demonstrated through an official letter approved by the governing body of each such community; and

(iv) That the following factors have been considered:

(A) The number of individuals from applicant communities who will be employed under the CDP, the nature of their work, and career advancement;

(B) The number and percentage of low-income persons residing in the applicant communities, and the economic opportunities provided to them through employment under the CDP;

(C) The number of communities cooperating in the application;

(D) The relative benefits to be derived by participating communities and the specific plans for developing a self-sustained fisheries economy; and

(E) The success or failure of the applicant and the managing organization in the execution of a prior CDP (e.g., exceeding a CDQ allocation or any other related violation may be considered a failure and may result in partially or fully precluding a CDP from a future CDQ allocation);.

(6) For purposes of this paragraph (f), "qualified applicant" means:

(i) A local fishermen's organization from an eligible community, or group of eligible communities, that is incorporated under the laws of the State

of Alaska, or under Federal law, and whose board of directors is composed of at least 75 percent resident fishermen of the community (or group of communities) that is making an application; or

(ii) A local economic development organization incorporated under the laws of the State of Alaska, or under Federal law, specifically for the purpose of designing and implementing a CDQ project, and that has a board of directors composed of at least 75 percent resident fishermen of the community (or group of communities) that is (are) making an application;

(7) For the purpose of this paragraph (f), "resident fisherman" means an individual with documented commercial or subsistence fishing activity who maintains a mailing address and permanent domicile in the community and is eligible to receive an Alaska Permanent Fund dividend at that address; and

(8) If a qualified applicant represents more than one community, the board of directors of the applicant must include at least one member from each of the communities represented.

(g) Monitoring of CDPs. (1) Approved CDPs for halibut and sablefish are required to submit annual reports to the

Governor by June 30 of the year following CDQ allocation. At the conclusion of a CDP, a final report will be required to be submitted to the Governor by June 30 of the final year of CDQ allocation. Annual reports for CDPs will include information describing how the CDP has met its [*59412] milestones, goals, and objectives. The Governor will submit an annual report to the Secretary on the final status of all concluding CDPs, and recommend whether allocations should be continued for those CDPs that are not yet concluded. The Secretary must notify the Governor in writing of receipt of the Governor's annual report, accepting or rejecting the annual report and the Governor's recommendations on the continuance of CDPs. If the Secretary rejects the Governor's annual report, the Secretary will return the Governor's annual report for revision and resubmission to the Secretary.

(2) If an applicant requests an increase in an existing halibut or sablefish CDQ allocation, the applicant must submit a new CDP application for review by the Governor and approval by the Secretary as described in paragraphs (d) and (e) of this section.

(3) Amendments to a CDP will require written notification to the Governor and subsequent approval by the Governor and

the Secretary before any change in a CDP can occur. The Governor may recommend to the Secretary that the request for an amendment be approved. The Secretary may notify the Governor in writing of approval or disapproval of the amendment. The Governor's recommendation for approval of an amendment will be deemed approved if the Secretary does not notify the Governor in writing within 30 days of receipt of the Governor's recommendation. If the Secretary determines that the CDP, if changed, would no longer meet the criteria under paragraph (f) of this section, the Secretary shall notify the Governor in writing of the reasons why the amendment cannot be approved.

(i) For the purposes of this section, amendments are defined as substantial changes in a CDP, including, but not limited to, the following:

(A) Any change in the relationships among the business partners;

(B) Any change in the profit sharing arrangements among the business partners, or any change to the budget for the CDP; or

(C) Any change in management structure of the project, including any change in audit procedures or control.

(ii) Notification of an amendment to a CDP shall include the following information:

(A) Description of the proposed change, including specific pages and text of the CDP that will be changed if the amendment is approved by the Secretary; and

(B) Explanation of why the change is necessary and appropriate. The explanation should identify which findings, if any, made by the Secretary in approving the CDP may need to be modified if the amendment is approved.

(h) Suspension or termination of a CDP. (1) The Secretary may, at any time, partially suspend, suspend, or terminate any CDP, upon written recommendation of the Governor setting out his reasons, that the CDP recipient is not complying with the regulations of this part. After review of the Governor's recommendation and reasons for a partial suspension, suspension, or termination of a CDP, the Secretary will notify the Governor in writing of approval or disapproval of the Governor's recommendation. In the event of approval of the Governor's recommendation, the Secretary will publish an announcement in the Federal Register that the CDP has been partially

suspended, suspended, or terminated along with reasons therefor.

(2) The Secretary also may partially suspend, suspend, or terminate any CDP at any time if the Secretary finds a recipient of a CDQ allocation pursuant to the CDP is not complying with the regulations of this part or other regulations or provisions of the Magnuson Act or other applicable law or if the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area is amended. Publication of suspension or termination will appear in the Federal Register along with the reasons therefor.

(3) The annual report for multi-year CDPs, which is required under paragraph (g) of this section, will be used by the Governor to review each CDP to determine if the CDP and CDQ allocation thereunder should be continued, decreased, partially suspended, suspended, or terminated under the following circumstances:

(i) If the Governor determines that the CDP will successfully meet its goals and objectives, the CDP may continue without any Secretarial action.

(ii) If the Governor determines that a CDP has not successfully met its goals and objectives, or appears unlikely to

become successful, the Governor may submit a recommendation to the Secretary that the CDP be partially suspended, suspended, or terminated. The Governor must set out in writing his reasons for recommending suspension or termination of the CDP. After review of the Governor's recommendation and reasons therefor, the Secretary will notify the Governor in writing of approval or disapproval of his recommendation. The Secretary will publish a notice in the Federal Register that the CDP has been suspended or, with reasons therefor, terminated.

(i) Compensation for CDQ allocations. (1) The Regional Director will compensate persons that receive a reduced halibut QS in IPHC regulatory areas 4B, 4C, 4D, or 4E because of the halibut CDQ program by adding halibut QS from IPHC regulatory areas 2C, 3A, and 3B. This compensation of halibut QS from areas 2C, 3A, and 3B will be allocated in proportion to the amount of halibut QS foregone due to the CDQ allocation authorized by this section.

(2) The Regional Director will compensate persons that receive a reduced sablefish QS in any Bering Sea and Aleutian Islands IFQ regulatory area because of the sablefish CDQ program by taking sablefish QS from the IFQ regulatory areas of the Gulf of Alaska

and allocating it in proportion to the loss suffered by persons in the BSAI area. Such additional compensation of sablefish QS will be allocated in proportion to the amount of sablefish QS foregone due to the CDQ allocation authorized by this section.

(3) Compensation of halibut and sablefish QS foregone due to the CDQ program will occur only in the first year of fishing under the IFQ program, and determination of persons and the amounts to be compensated will be based on the QS pool for all areas as of noon, Alaska local time, on January 31 of the first year of fishing under the IFQ program.

(j) Limitations on use of CDQ. (1) Fishing for CDQ halibut with fixed gear under an approved CDQ allocation may begin on the effective date of the allocation, except that CDQ fishing may occur only during the fishing periods specified in 50 CFR part 301. Fishing for CDQ sablefish with fixed gear under an approved CDQ allocation may begin on the effective date of the allocation, except that CDQ directed fishing may occur only during the IFQ fishing season specified in § 676.23 of this part.

(2) CDQ permits. The Regional Director will issue a CDQ permit to the managing organization responsible for carrying out an approved CDQ project. A CDQ permit

will authorize the managing organization identified on the permit to harvest halibut or sablefish with fixed gear from a specified area. A copy of the CDQ permit must be carried on any fishing vessel operated by or for the managing organization, and be made available for inspection by an authorized officer. Each CDQ permit will be non-transferable and will be effective for the duration of the CDQ project or until revoked, suspended, or modified.

(3) CDQ cards. The Regional Director will issue CDQ cards to all individuals named on an approved CDP application. [*59413] Each CDQ card will identify a CDQ permit number and the individual authorized by the managing organization to land halibut or sablefish for debit against its CDQ allocation.

(4) No person may alter, erase, or mutilate any CDQ permit or card or registered buyer permit issued under this section. Any such permit or card that has been intentionally altered, erased, or mutilated will be invalid.

(5) All landings of halibut or sablefish harvested under an approved CDQ project must be landed by a person with a valid CDQ card to a person with a valid registered buyer permit, and reported as prescribed in § 676.14 of this part.

Dockside sales and outside landings of halibut and sablefish under an approved CDQ program also may be made in compliance with § 676.14(d) of this part.

TABLE 1 to § 676.24-Communities Initially Determined To Be Eligible To Apply for Community Development Quotas

Aleutian Region

1. Atka
2. False Pass
3. Nelson Lagoon
4. Nikolski
5. St. George
6. St. Paul

Bering Strait

1. Brevig Mission
2. Diomede/Inalik
3. Elim
4. Gambell
5. Golovin
6. Koyuk
7. Nome
8. Savoonga
9. Shaktoolik
10. St. Michael
11. Stebbins
12. Teller
13. Unalakleet
14. Wales

15. White Mountain

Bristol Bay

1. Alegnagik
2. Clark's Point
3. Dillingham
4. Egegik
5. Ekuk
6. Manokotak
7. Naknek
8. Pilot Point/Ugashik
9. Port Heiden/Meschick
10. South Naknek
11. Sovonoski/King Salmon
12. Togiak
13. Twin Hills

Southwest Coastal Lowlands

1. Alakanuk
2. Chefornak
3. Chevak
4. Eek
5. Emmonak
6. Goodnews Bay
7. Hooper Bay
8. Kipnuk
9. Kongiganak
10. Kotlik
11. Kwigillingok
12. Mekoryuk
13. Newtok
14. Nightmute
15. Platinum

16. Quinhagak
17. Scammon Bay
18. Sheldon's Point
19. Toksook Bay
20. Tununak
21. Tuntutuliak

§ 676.25 -- Determinations and appeals.
[Reserved]

APPENDIX L - 28 U.S.C. §1254

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX M - 28 U.S.C. §1254

28 U.S.C. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections (c) and (d) and 1295 of this title.

APPENDIX N - Transcript of Oral Argument on December 19, 1994

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALLIANCE AGAINST IFQ'S, et al.,	)	Case No. A93-0480-CV (JKS)
Plaintiffs,	)	
vs.	)	Anchorage, Alaska
RONALD H. BROWN, et al.,	)	Monday, December 19, 1994 3:30 o'clock p.m.
Defendants.	)	

ORAL ARGUMENT ON ALL PENDING MOTIONS

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JAMES K. SINGLETON
UNITED STATES DISTRICT JUDGE

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ANCHORAGE, ALASKA
MONDAY, DECEMBER 19, 1994
(On record at 3:30 p.m)

THE CLERK: All rise. His Honor the Court, the United States District Court for the District of Alaska is now in session, the Honorable James K. Singleton presiding. Please be --

THE COURT: You may be seated. Court has before it at this time the matter of Alliance Against IFQ's, et al. versus Ronald H. Brown and others, A93, dash, 0480. This is the time set for the Court to announce its decision on a virtual file cabinet full of pending motions, and solicit from any party aggrieved by that tentative decision supplemental comment.

In order to put this matter in context, I suppose I should point out that the case deals with certain federal regulations promulgated on November the 9th, 1993, which significantly change halibut and sablefish, that is, black cod, fishing off the coast of Alaska.

The federal regulations govern commercial fishing conducted in the so-called Exclusive Economic Zone -- and incidentally, this case is replete with verbal formulas that cannot help but confuse, so I'll try to keep

abbreviations to the absolute minimum. But the Exclusive Economic Zone's the hundred ninety-seven miles seaward of the Alaska Territorial Sea, which is roughly three miles, and which taken together, constitutes the 200-mile zone that the United States has elected to regulate.

The regulations at issue were promulgated by the Secretary of Commerce, pursuant to the Magnuson Fishery Conservation and Management Act, pertaining to sablefish -- fishing, and the Northern Pacific Halibut Act of 1982, the Halibut Act pertaining to halibut fishing; respectively, 16 U.S. Code, Sections 1801 to 82 and 16 U.S. Code, Section 770 -- 773 to 773(k).

Because commercial halibut fishing is subject to a treaty between United States and Canada, the regulations pertaining to halibut fishing were approved under the Halibut Act; the sablefish fishing industry, however, is not governed by a treaty between the United States and Canada. As a result, the new regulations pertaining to sablefish were approved under the Magnuson Act.

The new regulations, among other things, create community development quotas, CDQ's, and individual fishing quotas, IFQ's, for the halibut and

sablefish industry. Plaintiffs challenged the regulations on numerous grounds. And before addressing in general and in particular those objections, I think it's important to stress a few things as partial background.

First of all, it is impossible to live in Alaska without being sensitive to the fact that federal regulation frequently has a serious adverse impact on men and women earning a living. Federal regulations of the fishing, timber, and mining industry necessarily have an adverse economic impact on some who make their livelihood in those industries. Unfortunately, men and women who are trained for no other career may, as a result of regulations, be literally banished from an industry and forced to seek employment in a hostile labor market where most of their training and experience are not transferrable.

So this is a significant issue. But in addressing such issues, the Court must constantly bear in mind the separation of powers and the limited authority of a federal trial court -- that a federal trial court has in passing on federal regulations.

There are few regulations that do not appear foolish to some and

malicious to others. The trial court cannot substitute its judgment for that of the regulators. Its sole responsibility to is -- is to assure that the Secretary and her subordinates gave the issue fair consideration and reached a reasoned judgment.

In determining issues regarding the enforceability of regulations, the Court must constantly bear in mind that someone virtually always benefits from a continuation of the status quo; and that whatever or wherever regulation changes that status quo, there would be some men and women who are financially or emotionally hurt, and will seek redress by paying imaginative lawyers to critique the regulators' decisions in order to postpone the inevitable and continue the status quo, if only for a while. For some, creative advocacy can virtually postpone decision making forever, as quibble is piled on quibble.

Illustrative is the flying unicorn style of argument. The complainer argues that environmental impact statement or other justification of regulatory action does not adequately address the impact of the agency's action on flying unicorns. The agency, somewhat naively, responds that there is no such thing as a flying unicorn, to which the reply is interposed, "But does the

agency's statement prove the absence of flying unicorns, and does the record support such proof beyond reasonable doubt?" Thus, to change the metaphor, proffering red herrings becomes an established form of advocacy in environmental and commercial regulatory litigation.

In order to permit an adequate discussion of the voluminous record and allow ample opportunity for creative advocacy, the Court waived the briefing limitations normally imposed under Rule 5, and allowed the parties the opportunity to exhaustively brief any conceivable issue that occurred to their heightened imaginations, and any related issues that in their view were necessary to illuminate the record. The parties have availed themselves of the opportunity, and everything that could possibly be said has been said at least twice or more.

The case is therefore ripe for decision. Giving -- given the extent of the briefing, there is little need for a set argument in which each affected party would present -- prepare arguments through counsel, subject to response and reply. Instead, the Court will announce its tentative conclusions, in which it will address those issues it considers significant and then permit any party

aggrieved by the result to speak briefly to correct any factual or legal errors.

The tentative decision is not intended to chill or discourage oral advocacy, but rather, to focus counsel's attention on those matters the Court considers dispositive, in order to avoid the necessity of a motion for rehearing or reconsideration. Again, it is not my intention to exhaustively summarize the record, summarize the briefing. Please be assured that everything that you have committed to paper is a part of the record and will be available for review by anyone who at any time considers review records significant, whether in this or another court.

The Court has -- well, and I probably should say that the parties have done an excellent job in sketching their respective positions, identifying what they perceive to be the issues, and fairly exhaustively evaluating, discussing, and presenting the long, laborious, heavily-studied history of these problems as they have been encountered by the regulatory agencies involved in addressing and resolving them. And because the parties' presentations are so exhaustive, it would be impossible in the time allocated for the Court to even touch on the high

points, even remotely summarize everything that has been said.

So by stressing some items, addressing some items, the Court does not mean to suggest that others have been totally ignored. Rather, there are some items that I think bear comment. But the parties should be assured that everything they have said has been digested, evaluated, checked against the record, and incorporated into the final decision making process.

Okay. At the outset, I think the parties are in agreement that this Court's powers of review are substantially limited, whether we look at the APA or the Magnuson (ph) Act. The Ninth Circuit probably has done as good a job as any in its Washington Crab Producers, Inc. versus Mosbacher (ph) case, 924 Fed. Second 1438, a 1991 decision, in setting out how the Court should approach the issues presented in this case. And I think the parties are in agreement.that both under the Magnuson Act and the Administrative Procedure Act, the Court must accept these agencies' actions, the Secretary's decisions, unless they are arbitrary, capricious, an abuse of discretion, not in accordance with law, et cetera; and that in deciding the primary issue presented by the parties' dispute -- namely, whether the

Secretary has given adequate consideration to the record, adequate consideration to alternatives, adequate consideration to all of the possibilities, the maybes, the might-have-beens, that in any area of human endeavor will be presented to the imaginative and the creative, the Court should only ask that the Secretary made a reasonable effort to address the issues in controversy and reach a reasoned conclusion.

Or, as one Court put it, it -- the Court's only function is to determine whether the Secretary has considered the relevant factors and articulated a rational connection between the facts found and the judgments made.

Now, the plaintiff has broken its attack down into 10 subject areas. The first is to argue that the objectives of the IFQ program and the means chosen to achieve those objectives conflict to such an extent that the program is not rationally .based and is thus not sustainable.

The Court has very carefully considered plaintiffs' arguments, which are presented at length and in detail, and has reviewed the response to those arguments. And my conclusion is that the record presented simply shows what is

virtually always the case where difficult decisions involving commercial and environmental interests are presented. Clearly, there will always be arguments, pro and con. If issues were simple, there would be no need for statutory and regulatory procedures.

The significant question is, did the Secretary consider all of the relevant considerations and strike a reasoned balance? I conclude that she did. I think that the arguments that plaintiff makes in its first section were appropriately presented to the regulatory agencies and resolved there. And while reasonable men and women no doubt could differ as to how the balance should have been stricken, as to what testimony, what evidence should have been credited, and what weight to assign to various considerations, the decision that the Secretary made in adopting in large part the Council's recommendations is not an irrational one, and not one that departs from the Secretary's obligation to carefully consider all relevant considerations in reaching a decision.

Will Rogers once suggested that he never met a man he didn't like. I think it could be easy to say for anyone who's been a judge for a long time, that a person rarely encounters a statute or regulation that does that. But the

problem is not whether the Court thinks the Secretary reached the right conclusion, whether the Court thinks the Secretary allocated rights and interest in deprivations properly among the contending factions; but rather, did the Secretary act rationally. And I conclude she did.

Secondly, the plaintiff contends that the Council and the Secretary failed to conduct an analysis of whether quota shares constitute property, and thus failed to consider a highly relevant factor in their decision. Essentially, the plaintiffs' argument is that if it should be determined that the regulatory structure creates vested property rights, then reallocating, readjusting, monitoring, and modifying those rights will be so expensive, so time-consuming, and so disruptive of meaningful use of the fishery, that these problems alone will outweigh any benefits from shifting from the status quo to the IFQ proceedings.

I think this is a red herring argument. First of all, I think that the cases that are cited fail -- as utilized by plaintiff, fail to differentiate between a claim by a person that he or she received a license, a franchise, or right to conduct an operation from one governmental agency, from one unit of

government, that was taken away by another unit of government, a unit of government that had no power to enforce the regulatory scheme giving rise to the property interest.

I think when we recognize that it is the federal government that is establishing these rights under the IFQ system, and it is the system itself that determines the extent of the rights and the circumstances under which they may be revoked or modified, the Fifth Amendment problem disappears. And I think that the -- so I think that in the context of this case, while it is certainly arguable that the Secretary killed a number of trees and spilled a quantity of ink in addressing these property issues, I consider them of little significance.

Certainly, the Lorenson (ph) type of case has no bearing whatsoever on the situation here. For there, it was the State of Alaska that created an interest, arguably a property interest; and it was the federal government that was attempting to interfere with that interest, by asserting a lien and a right to foreclose that interest under circumstances arguably inconsistent with state law.

There was no Fifth Amendment implication in the Lorenson case. Nor

was there any question that the State of Alaska could have made the limited entry permits subject to state law and state taxation. The problem presented by that case, and the willingness of the federal government, the state, and the parties to certify it to the Alaska Supreme Court, was the potential conflict between state and federal law. And the Alaska Supreme Court's refusal of certification indicated at least that Court's conclusion that there was no real significant issue involved. But regardless of whether the Supreme Court of Alaska was correct or incorrect in that decision, it is clear that no comparable considerations apply here.

(Pause)

THE COURT: Next, the plaintiffs argue that the Secretary's change in the port clearance system is inconsistent with National Standard 1, was not analyzed by the Council or the -- under the National Environmental Protection Act process, was unilaterally promulgated by the Secretary without proper authority. Well, it seems to me that's another red herring issue. I hate -- in this kind of case, I hate to use that metaphor, because it sounds like a pun, but it isn't.

I think that the importance about the port clearance, clearly, there

are tremendous political implications there. And to that extent I think plaintiff is probably correct, although the defendants deny that there -- anything political about this case at all. I think we all take that argument with a grain of salt.

But I think the important point is that the port clearance is a rather minor aspect of the total overall plan. Clearly, it has to do with enforcement. Clearly, there are men and women in enforcement that think that port clearance is significant in terms of being able to effectually enforce the Act, given probable, estimable resources. On the other hand, I think everyone concedes that enforcement is as much a function of allocatable resources as it is any particular enforcement plan.

So I think that in context, that is simply not a significant aspect, and I certainly considered everything Mr. Flannigan (ph) had to say, pro, con, up and down. I'm sure that Mr. Flannigan would love to have the entire United States Navy available for his enforcement efforts. And perhaps as world conditions ameliorate, he might get that wish. I certainly would love to see large numbers of naval vessels that otherwise are aimed at mothballing reallocated to Alaska and home ported here. And I'm sure our

congressional delegation will do everything in their power to assure that. But regardless of that, I think that the home porting issue is simply minor. I think the defendants probably are right that that is an area in which plaintiffs' standing reaches de minimis considerations, but I'm not going to stress lack of standing.

Plaintiffs next argue that the Secretary violated the Magnuson Act in failing to hold preemption hearings when extending the IFQ programs into state waters. There I think standing is a really significant issue; because it is only truly the State of Alaska that has standing to question the impact of federal law on state law. And we have the benefit, I think, of representations by the state that are binding on the state, suggesting that there are no conflicts, and that the Act has -- or not the Act, but rather, the regulations, as promulgated -- meet with state approval. So I think that that probably is dispositive of that issue. I, frankly, don't see any significant conflict. I can understand that the Secretary did not either.

Next, the plaintiffs argue that the IFQ program violates National Standard 7, because the cost of administering, monitoring, and enforcing

the program is excessive when compared to reasonable alternatives. Again, plaintiffs' arguments are all rational. Certainly, men and women, given the responsibility of making decisions, could well have come down on plaintiffs' side rather than the side that ultimately prevailed. That, however, is not the issue on judicial review. The judicial review is not, could another decision be rationalized and supported; but rather, did the Secretary make a decision that is so irrational, so arbitrary, and so without foundation, that the Court can properly and profitably set it aside.

And my conclusion is no. I think the Secretary's decision that the benefits from the IFQ program outweigh the detriments, was well within the Secretary's competence and well within the record.

Next, the plaintiffs argue that the CDQ program violates National Standard 4 and the Halibut Act, because it impermissibly discriminates and unfairly allocates fishing rights. Now, the plaintiffs were not able to find any case law -- and I'm not faulting them for that; I don't think there is any case law -- dealing with a system similar to this one.

We're in an area where the federal government is not adopting a state statute or a state policy discriminating against non-state residents. This is not a situation in which residence in Alaska, per se, entitles anyone to any beneficial or preferential rights under the statute.

Question is much narrower. And that is, is the standard, Standard 4, violated where the federal government, irrespective of any state action, prefers certain residents of a state to everyone else, including other residents of that state. And my conclusion is, National Standard 4 simply doesn't apply to that situation.

It is therefore not necessary to go the one step further that I think could arguably be gone, and that is, whether the Secretary could disregard National Standard 4 or rationalize it out of existence because the beneficiaries of the discrimination are Alaska Natives living on the coast; that would bring us into consideration of the whole history of Indian law in the United States, and the oft-repeated comments by the United States Supreme Court that discrimination in favor of Indians does not violate any of the constitutional provisions limiting discrimination between other citizens. And that is because of the special

consideration that American Indians, and by extension, Alaska Natives, are entitled to under the Constitution of the United States. Not ruling on that. But I think that is a very significant issue.

It is probable that if the Secretary wanted to do so, she could significantly benefit Alaska Natives at the expense of everyone else, without violating the Magnuson Act and definitely without violating the Constitution of the United States. I'm not satisfied that she's done that, I think that the rationale that's been given for her actions by the defendants that economic problems of the west coast of Alaska, irrespective of the ethnic background of the men and women affected by those economic problems, are sufficient in and of themselves to justify the Secretary's actions.

But I do want to make it clear, because the issue might arise again, that the Secretary probably has substantial authority, without violating National Standard 4, to specifically, intentionally, and voluntarily benefit Alaska Natives, if she spells out the fact that that is what she is doing.

Plaintiffs argue that the IFQ violates National Standard 5, because economic allocation is the sole purpose

of the CDQ plan. I'm not sure that's true. Again, I think that there are significant overlapping Indian law considerations that transcend mere economics. But I think that in the context in which the Secretary acted, her conclusions are within the parameters of the statutes, and therefore do not violate National Standard 5.

Plaintiff argues that the IFQ program is inconsistent with the Magnuson Act and the Halibut Act, in that it establishes a limited access system but fails to take into account the factors required to be considered under 16 U.S. Code Section 1853, small (b)(6). And those factors are: Present participation in the fishery; historical fishing practices in and dependence on the fisheries; the economics of the fishery; the capability of fishing vessels used in the fishery to engage in other fisheries; the cultural and social framework relevant to the fishery; and any other relevant consideration; 16 U.S. Code Section 1853.(b)(6).

The argument here is representative of an argument -- and I don't mean to be disrespectful to the plaintiffs. But the Court gets this kind of argument very, very frequently. And it is in the form -- the action by the state, the regulatory agency, the

administrator, the Governor, the President of the United States, whoever, "clearly and unequivocally violated my rights because it is irrational and unfair. And the reason you should find that it is irrational and unfair is that I lost. And that if I -- the very fact that I lost established that the decision against me was irrational, because no rational fact finder could ever rule against me."

Well, unfortunately, in our system, whether the decision maker be an administrative agency, a jury, state or federal, someone in the executive branch, reasonable men and women frequently can differ as to how a decision should be made. And the mere fact that a decision goes against a party is given little weight in determining whether that decision is rational or irrational. We have to look at the record. And when we look at the record, it seems to me that all of those considerations -- and I have listed them -- were considered by the agency.

Now, reasonable men and women well could differ as to what weight to give to each of those considerations against the totality of the background of this long-studied, carefully evaluated series of issues. Clearly, there would be winners and losers. Clearly, if one

did an inventory of all the winners and losers, most men and women could find losers who appear more worthy and more deserving of attention than some of the winners. And that, of course, is one of the practical problems of action. But of course, inaction frequently has the same results.

In the last analysis, we must look to those given by law and decision-making responsibility to make those hard decisions. The Secretary made the hard decision, and I think the decision is one that can be supported.

Now, the main argument that plaintiff makes -- and it is a valid one, and it's certainly one that the Alaska limited entry program addressed slightly differently -- and that is the relative rights of ship owners, vessel owners, vis a vis skippers and crewmembers. No question that a rational decision maker could have allocated benefits differently.

Defendants point out -- and I think with some correctness -- that one of the practical problems in protecting the expectations of skippers and crewmembers is difficulty in identifying who they are. And I don't mean to jump outside the record beyond, I suppose, the Pacific Reporter in the Alaska Supreme

Court decisions that attempt to deal with the problems of identifying who was in the fishery and who was not in the fishery, in saying that that is not an inconsiderable concern. Clearly, the administrative burden of trying to identify every man or woman who had a reasonable expectation of continued participation in the fishery, by virtue of his or her having skippered or crewed a vessel, would have been significant. And the fact that the Secretary elected not to get involved in that, while open to question, is not irrational.

Plaintiffs argue that the restrictions placed on the use and transfer of catcher vessel IFQ by corporations and estates render the IFQ program arbitrary and capricious and not in accordance with law. This is really a modification or a variation on the earlier argument. Clearly, crewmembers and skippers are not treated with the same care and protection that another fact finder, another decision maker, might have provided.

The Council, in determining the transfer restrictions, received considerable input from the public. Apparently, 16 percent of the comments were on the issue, according to at least one citation to the record.

I don't think the fact that the Council and the Secretary decided this issue differently than the way plaintiffs would like to have had it decided rendered it arbitrary or capricious. Again, I think this is one of the areas in which strong arguments could be marshaled against the position that the Secretary took. But I think that's virtually always the case where men and women, adequately financed, with a real stake in the outcome, clash. I think probably, the solution to problems like this lies in the political, not the judicial forum.

Finally, plaintiffs argue that the Secretary failed to adequately consider all relevant factors and alternatives, and failed to adequately study, develop, and describe appropriate alternatives to the IFQ proposal. And this, of course, is an area that's gotten a lot of attention from federal district courts. There clearly are district judges who do not keep in mind the limitations . that the United States Supreme Court has placed upon trial court intervention.

This is really the area in which I'm concerned about the flying unicorn argument. Seems to me that within the confines of this exhaustive record, within the confines of issues that have

literally been studied to death, within the significant time that has elapsed while this study was ongoing, the Secretary adequately considered all relevant factors and alternatives; it did not fail to study, develop, and describe appropriate alternatives to the IFQ proposal.

Certainly, there were men and women who advocated continuation of the status quo. That will almost always be the case. Certainly, creative litigators can come up with alternatives to any policy contemplated within the mind of womankind or mankind. But the mere fact that those who have a significant stake in avoiding regulation can always come up with more things to study, more things to evaluate, more things to consider, and more things to debate, is not a justification for indefinite postponement of action.

In this case, given the significant time that elapsed, given the significant record that was established, given the significant consideration that was given to virtually every conceivable objection that might possibly be raised to a regulatory action, I am satisfied that the Secretary took her best shot and did the best she could under the circumstances.

I therefore conclude that intervenors' cross-motion for summary judgment at Docket 66, joined in by the United States at Docket 7 -- 70 -- should be granted; and that plaintiffs' motion for summary judgment at Docket 62 should be denied.

Now, the defendants have made certain motions for partial summary judgment, respectively, at Dockets 68 and 69. The essential argument is that there are issues presented on review that were not adequately developed at the administrative level. My conclusion is that those issues are moot in light of the conclusions I have reached.

My decision that the Secretary acted within her area of expertise and that her actions are consistent with the statutes and her regulations enforceable, in my view make it unnecessary to go back and decide whether -- what was and what was not adequately raised before the agency.

Of course, a party who prevails on the issue is always free to argue in the appellate court that there were other and better reasons why he or she should have prevailed than those rest -- that the trial court rested upon. So my finding that those arguments are moot would in no way preclude he or she who

advocably or aggressively pursues them from pursuing them further on further appeal.

Okay. Ms. Sanford, are you going to be arguing on behalf of --

MS. SANFORD: Yes, Your Honor.

THE COURT: Very well. Do you want to respond to the tentative decision, briefly?

MS. SANFORD: Yes. And I will be brief, since it's probably sensible to be so under the circumstances.

The first point I would like to address is the port clearance requirement and the tentative decision with regard to whether that issue is or is not a red herring. I think the important point to remember in determining whether this is simply a minor part of the plan is the fact that an IFQ system is unique in the kinds of incentives that it provides for IFQ holders to under-report, or indeed, fail to report at all, fish that they might take under this scheme.

This is a situation where each person's take of the fish, and therefore, each person's potential profit, depends on the amount of fish that he or she takes and is able to sell. Unlike the

previous system where your amount of fish and the amount of profit that you made from it didn't depend on you so much as it depended on how quickly the season was closed, the tack was achieved. In the -- under the IFQ system -- and this was mentioned over and over again in the agency's own NEPA (ph) analysis -- under-reporting and unreporting were identified by everyone who looked at this scheme as extremely serious potential problems. In fact, at one point, the FEI --

THE COURT: Well, counsel, isn't that going to be a problem -- setting aside momentarily the problem of pacifying Washington senators and representatives by allowing people to use their cities to report -- which is a political issue, not a regulatory issue -- isn't problems of under-reporting going to be true of any system that attempts to limit the quantity of fish that any particular individual can take?

MS.. SANFORD: I think that --

THE COURT: Apart from attempts to indirectly do that by cutting down on the time that he or she may be on the fishery.

MS. SANFORD: I think that an IFQ scheme, or indeed, any scheme like an

IFQ which gives you as an individual a certain amount of poundage, gives you an incentive to exceed and to hide it. Now, I understand the Court's possible concerns about empire building by Mr. Flannigan, et cetera, having the U.S. Navy there to enforce --

THE COURT: Well, the other option --

MS. SANFORD: -- but --

THE COURT: -- and one of the options that I think has been widely utilized is to try to hire men and women and put them on boats and on vessels as spotters of one kind or another. But that's extremely expensive.

MS. SANFORD: That's extremely expensive. And in fact, since we're going to have more vessels out on the fishing grounds that has -- than have ever participated before in a single year, that -- I see nothing in the documents that indicates that NMFS even has that kind of option available.

Mr. Flannigan was in a position of responsibility at NMFS. He was the chief enforcement officer and the architect of the entire enforcement plan for the IFQ system. The agency relied on his expertise, they relied on his views up to a certain point, up to the point

when his view became inconvenient; because this plan, by that -- by the time it got to the Secretary, had acquired so much momentum that nothing was going to stop it. Even a fatal flaw detected at the last minute, whether it was a political decision or a -- whether it was the NOAA general counsel that said, "Stop. This violates constitutional prohibitions -- "

THE COURT: And that certainly is arguable.

MS. SANFORD: That -- certainly it is. They may have had a Hobson's choice here, Your Honor. But by solving one problem, they simply created another.

Now, I see nothing in the record, and I have been pointed to none, which indicates that the Secretary made a reasoned determination that removing the Alaska port clearance requirement would not undermine the effectiveness of the enforcement program. There is simply no document in the record which addresses that concern, other than the documents in the record which we asked to have put in the record, indicating that Mr. Flannigan, the architect of the enforcement plan, was of the view that this presented a very serious problem. And why? Because you look at the coastline, and you can see just from

geography, what happens if vessels aren't required to clear an Alaska port before they leave.

As Mr. Flannigan pointed out, there are hundreds of miles of coastline. The Canadian system has already had enforcement problems, and the Canadian system has a hundred-percent observer coverage at every port, which this system doesn't even come close to. Mr. Flannigan had indications and reports from Canadian enforcement officials that there were people slipping through even in a situation like that.

Here, there's no check at all, other than a radio call-in. A vessel's out there, say they have a hundred thousand pounds of fish. They report by radio to NMFS that they have 50,000. They go halfway down the coast before they get to Bellingham and they offload in Canada, or somewhere else in Puget Sound, the giant sieve. And then they get to Bellingham, and they arrive with 50,000 fish. The other 50,000 --

THE COURT: Well --

MS. SANFORD: -- are lost.

THE COURT: -- it seems, counsel, that the dilemma you pose is the dilemma that law enforcement will always

have with complainantless crimes. I think it's probably an error to refer to them as victimless crimes, because generally, we are all victims where certain practices that all involved in the practice benefit from, but are nevertheless socially undesirable, go on. But we have problems with complainantless crimes.

And as defendant points out, the government has developed techniques for dealing with complainantless crimes. The easiest one is to sneak observers aboard a random sample of vessels, particularly vessels where reports -- men and women who've served on the vessel and are angry because they didn't get the benefits they thought they should have gotten or just didn't get along with the management, will make reports. The government can make a case by simply sneaking a -- an undercover agent aboard, and so on.

There are enforcement techniques to deal with complainantless crimes, and they do create a certain level of uncertainty and fear in the men and women that carry out that activity. Clearly, the war on drugs establishes that it doesn't -- isn't a hundred-percent effective; but at least there are techniques that they can deal with this.

MS. SANFORD: But it wasn't considered here, Your Honor. No one offered that possibility. No one offered it as an option or a suggestion. There's no indication that funding would be available, but even more to the point, that alternative wasn't considered. That -- if that's a relevant factor, the Secretary didn't look at it.

What happened here is that this plan had acquired momentum. What happened here is that there was going to be no way to stop it by the time it got to the Secretary. And yet there was a fatally defective flaw. This plan was inconsistent with applicable law, as determined by the NOAA general counsel's office. That's why the decision was made at the last minute. And --

THE COURT: And your suggestion is that as a matter of law, and beyond the discretion of the Secretary, once the constitutional problem surfaced, she was obligate -- or he was obligated to send it back to the drawing board. You can't resolve the matter at the Secretary's level.

MS. SANFORD: Certainly not without analysis. Certainly not against the advice of your chief enforcement officer, who was the architect of the plan that you're reviewing. There's no

support in the record anywhere for the effectiveness of this program without that requirement. The only documentation in the record dealing with this issue is documents that say this is a very serious problem. We can throw stopgap measures at it, but we have essentially lost all deterrence effect as a result of this last-minute change.

And it wasn't just Mr. Flannigan, Your Honor. There's a memo by Steven Pinoyer (ph) in the record which says, "I'm not sure that we didn't get legally snookered on the Alaskan check-in requirement." And it was Mr. Pinoyer who asked Mr. Flannigan, "Let's have your candid opinion," whose candid opinion he obviously valued, or he wouldn't have asked for it, about what effect this last-minute change is going to have on the effectiveness of the enforcement scheme.

And the NEPA documents all the way through said, "This program has serious risks." EPA saw serious risks. This program has serious risks; it has to have an effective, comprehensive enforcement mechanism. The comprehensive enforcement mechanism that was there, that was sent to the Secretary, included that port clearance requirement. When the plan came out in final form, it was gone.

There was no public discussion of what would happen if it were gone; there was no agency examination of a highly relevant factor, other than Mr. Flannigan's memos in the file, Your Honor. There is no support in this record for the Secretary's, quote, "determination" that this would not be a serious blow to the effectiveness of the enforcement program. There's nothing there.

But the program had gotten too far down the road. It couldn't be stopped at that point because of the political momentum behind it. That is not a reason to uphold what is otherwise a patent violation of the Secretary's responsibilities and a complete failure to analyze that highly relevant factor, a factor that had been discussed as relevant throughout every environmental document that was prepared on this scheme.

And it wasn't just Mr. Pinoyer -- I.mean, excuse me -- it wasn't just Mr. Flannigan; Mr. Pinoyer was concerned about it as well. And there was no public comment, no analysis by the Council, nothing. It was just changed at the last minute. We may understand why it was changed, but that doesn't excuse or make legal the fix that occurred at the end.

So I will have to respectfully disagree with Your Honor's characterization of that issue as a red herring. I think, indeed, it's an extremely important defect in this plan, and it has conservation implications for the continued health of this fishery resource which no one has a clue or has ever even analyzed, doesn't even have an educated guess as to what effect that might have, because no one has ever analyzed it, other than Mr. Flannigan's reaction that this is going to be a disaster. There's a -- there are a thousand landing sites from here to Bellingham, any one of which could be used.

With regard to the federal regulation of activities in state waters issue, I'd like to just read what the State of Alaska said in its amicus brief, if I may, just one sentence. It says:

> "The state is concerned with and opposes federal defendants' conclusion that federal regulations automatically apply to federally permitted vessels fishing in state waters in the absence of state regulations or as long as there is no conflict with an existing state regulation."

The state is not of the view that this is okay because there is no conflict.

THE COURT: Isn't it more accurate to say, the state does not object to these regulations and their enforcement; the state objects to the manner of defending them in the federal brief?

MS. SANFORD: The state objects to the government's argument that the requirements of Section 1856, the Magnuson Act, are not necessary when the federal government decides to regulate activities in state waters, as long as there's no conflict.

The federal argument, Your Honor -- the Magnuson Act says, in plain terms, if the federal government wants to regulate activities within state waters, if the federal government wants to apply federal regulations to activities in state waters, it must hold a preemption hearing and it must show that the state's action or inaction substantially and adversely affects federal activities within the EEZ.

The irony of this situation is that NMFS keeps talking about, "Well, we can do this because there's no conflict." Indeed, they cannot do it if there is no

conflict. The Magnuson Act provides that the feds can only do this if there is a conflict. Otherwise, there's no justification for federal regulation in state waters. The federal government would have no interest in regulating activities in state waters if there were not a conflict. And that's why they're required to prove that there is a conflict before they impose any federal regulations on activities in state waters. But the agency has constantly put the cart before the horse. They make a unilateral decision that it -- there's no conflict. That means, under the Magnuson Act, they cannot regulate at all in state waters.

There has been a fundamental misunderstanding on the part of NMFS with regard to this Magnuson Act provision, and they have gotten away with it in the past because it hasn't been challenged. They has -- have as a matter of routine practice applied, on occasion, federal regulations in state waters without going through the necessary procedures.

We don't know what the state will do down the road. But we do know that the purpose of that provision was to keep the federal government out of the state's business. There is a reason for that provision in the statute. And what it says is, "Federal government, you

can't impose any of your regulations, whether they conflict or not with state regulations, in state waters unless you show there's a conflict." And in fact, NMFS here is saying, well, there's no conflict. They -- they've just undercut their whole position. Because if there's no conflict, they can't regulate in state waters at all. That's what the Magnuson Act says, and that is what the state, in its somewhat -- I hesitate to use the word "muddled" -- but that's what the state says in its brief. And that's what they're upset about, and that is a violation of the Magnuson Act as well.

Finally, with regard to limited access factors and present participation in the fisheries; certainly, it is true that in any allocation scheme, groups win, groups lose. Nineteen eighty-eight to 1990 were chosen as the eligibility years. Since that time, this rule has dragged through year after year. It sat at the Department of Commerce for over a year before the final regulations were published. . We are almost into 1995, which is when this program is scheduled to begin.

Recent estimates indicate that as many as 60 percent of the people who have already been issued QS have not participated in the fishery since 1990. Basically, the statistics show people got

in in -- up to 1990, then they got out, and they sat and they waited to reap their windfall. And all of the folks who have been --

THE COURT: Well, counsel, in any situation in which the federal government is contemplating regulation, and in order to carry regulation into effect, must publish its intention, permit notice and comment, go through a long deliberative process, are not all men and women who enter an area, knowing that it is in the process of being regulated, on notice of that potential regulation and on notice of the circumstances that will govern that regulation? Can anybody really say that he or she went into the fishery after the qualification period, reasonably blind as to the possible implications of those regulations ultimately being adopted and enforced?

MS. SANFORD: No, I don't think I would say that. But what I would say is that if you are going to adopt a cutoff date -- and it's not unreasonable to adopt a cutoff date under circumstances such as this -- then you have an obligation if you are required to consider present participation in the fishery to move expeditiously, to, if you will, have your ducks in a row, to move --

THE COURT: Well, isn't that -- doesn't that --

MS. SANFORD: To move a rule --

THE COURT: -- conflict with your base argument, which is they didn't study it enough, they didn't consider enough, they didn't take enough time and spend enough effort in evaluation? How can you at the same time argue that they should have done so much more and that they should have done it so much faster?

MS. SANFORD: Because NMFS was involved in the preparation of this plan from the very outset. As Mr. Flannigan said in one of his memos, while this matter was before the North Pacific Fishery Management Council, NMFS was repeatedly informed that the assistant administrator of fisheries liked IFQ programs and wanted this one, and that the staff was directed to make it work somehow. This -- these weren't new issues to NMFS or to the Secretary. These had been worked on in Juneau, they had been worked on in Washington, for a long period of time.

When it got to Washington, for reasons that no one is clear about, the rule sat for over a year between arrival at the Department and publication of the final rule. And there were relatively

few changes, other than, for instance, the important port requirement, from proposed rule to final rule. And yet, it was at the Department for over an year, an unusually, very unusually, long period of time.

THE COURT: Doesn't that suggest that the Secretary was giving it consideration, and that the political process was operating, raising problems and non-problems and so on?

MS. SANFORD: Only if there's documentation of that in the record, Your Honor, could we draw that conclusion. And there isn't. Certainly not with regard to the port clearance requirement.

But my point with regard to limited access is, we're now in 1995. Nineteen ninety may have been a reasonable cutoff at some point. The delay in the approval process and implementation process has now meant that people who haven't fished in this fishery since 1988 are going to reap huge profits with the allocation of QS, and that that is inconsistent with the intent of that Magnuson Act provision, which provides that present participation must be considered.

I believe that concludes what I want to address right now, unless the Court has further questions.

THE COURT: No further questions, counsel. And I do want to commend you on an eloquent, not only orally eloquent, but an eloquent presentation of the plaintiffs' position in the briefing.

The -- as I indicated at the outset, I think that the issues presented in any program of this nature are necessarily compelling because so many men and women are affected by the outcome. And given a number of considerations regarding the fishing, mining, and timber industries, any Alaskan must be sensitive to the fact that regulation will work significant disruption in the hopes, aspirations, and expectations of the men and women involved in those industries. And I think that probably, this will continue throughout the foreseeable future.

Nonetheless, I think the Court has to be sensitive to the separation of powers and its responsibility not to substitute its judgment for that of the Secretary. I'm simply not satisfied that the shift in ports of call, having to do as it does with enforcement, so significantly changes the plan as to

require that the matter be referred back to the Council for further consideration and deliberations. Certainly, the constitutional problem is a significant reason for the Secretary's action. And I don't think the record need require a full and complete alternate elaboration.

As far as the effective date of the statute, I think that again, clearly, men and women will be adversely affected. Certainly those who oppose the regulation had hopes that it could be set aside, and that participation during the intervening time might create a right to benefits. But on the other hand, the Court cannot find that people who took that risk were not on notice that it existed.

Clearly, anyone who participated in the fishery during the intervening time knew that the regulations were before the Secretary; knew that there was a risk that the Secretary would adopt the regulations, would adopt the plan and enforce it; and knew that if the plan went into effect, the entry date would have been set prior to the time that they first began participation and thus became eligible for benefits. So I can't find that that determination by the Secretary to stick with the earlier entry date was arbitrary and capricious.

Consequently, the Court will adhere to its tentative decision; will deny the motion for summary judgment at Docket Number 62; will grant the intervening -- intervenors' cross-motion for summary judgment at Docket Number 66; will find that the Defendant Western Alaska Fisheries' motion for partial summary judgment at Docket Number 68 is moot; will find that Defendant Western Alaska Fisheries' motion for partial summary judgment at Docket Number 69 is also moot; and will find that its action on the motion at Docket Number 66 incorporates granting the motion by the federal defendants at Docket Number 7 -- 70 for summary judgment.

To recapitulate, plaintiffs' motion at Docket Number 62 is denied; intervenors' motion at Docket Number 66 is granted; federal defendants' cross-motion at Docket Number 70 is granted; and Defendant Western Alaska Fisheries' motions at Docket 68 and 69 are denied, simply because I find them moot and that it is not necessary to reach those issues.

Those are the conclusions that the Court intends to adopt. On the other hand, the Court has not heard from any of the defendants. And if anyone has something that he or she feels must be said, lest the record go unprotected, let

him or her now speak or forever hold their peace, recognizing that it would not be the first time that a defendant's comment changed my mind and led me to go back and (laughter) reevaluate the issues.

Do any of the defendants -- I -- is there a representative of the State of Alaska here today? I think there is. Isn't there? No. Okay.

UNIDENTIFIED MALE SPEAKER: No.

UNIDENTIFIED MALE SPEAKER: No, sir.

THE COURT: Does anyone have anything that he or she feels needs to be added? Counsel?

UNIDENTIFIED MALE SPEAKER: No, sir.

THE COURT: Very well. Court will stand in recess.

THE CLERK: Court is adjourned, subject to call.

(Whereupon, the proceedings in the above-entitled matter were adjourned at 4:35 o'clock p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

_____

Teresa K. Combs, Transcriber
Date

(3)

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CLERK

No. 96-1128

In the

Supreme Court of the United States

October Term, 1996

ALLIANCE AGAINST IFQS, *et al.*,

Petitioners,

vs.

RONALD H. BROWN, Secretary of Commerce, *et al.*,

Respondents,

and

PETER M. KNUTSEN, *et al.*,

Intervenor - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AND APPENDIX OF THE INTERVENOR-RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. When a statute creates a committee to prepare recommendations for the Secretary of Commerce but empowers the Secretary to accept or reject those recommendations, is the final agency action which is subject to judicial review the decision of the Secretary of Commerce or the decision of the advisory committee.

2. When a statute provides that the applicable standard of judicial review is the arbitrary and capricious standard, should a court nevertheless apply a less deferential standard when (a) an advisory committee to the Secretary of Commerce is comprised in part of individuals who are interested parties and (b) the statute requires that those individuals be interested parties.

LIST OF ALL PARTIES TO THE PROCEEDING, PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

The caption of the case contains the names of all parties. All Intervenor-Respondents are individuals. No Intervenor-Respondent is a corporation.

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No. 96-1128

In the

Supreme Court of the United States

October Term, 1996

ALLIANCE AGAINST IFQS; LADY BLACKIE, INC.; MAKO HAGGERTY; MATHEW DONOHOE; NANCY L. LANDE; ADRIAN LECORNU; HOWARD CARLOUGH; JERE MURRAY; PAUL K. SEATON; WILLIAM SULLIVAN; DON HALL;

Petitioners,

vs.

RONALD H. BROWN, Secretary of Commerce; CLARENCE B. PAUTZKE, Executive Director North Pacific Fisheries Management Council; WESTERN ALASKA FISHERIES DEVELOPMENT ASSOCIATION;

Respondents,

and

PETER M. KNUTSEN; EDWIN FUGLVOG; ROBERT J. WURM; ANDREW SCALZI; NANCY PHILLIPS, et al.;

Intervenor - Respondents.

BRIEF AND APPENDIX OF THE INTERVENOR-RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. INTRODUCTION AND SUMMARY

Intervenor-Respondents Peter M. Knutsen, *et al.*, urge this Court to deny the Petition for a Writ of Certiorari ("Petition") because:

(1) the Petition presents certain arguments never raised below,

(2) the Petition presents no issue in which there is a conflict among the courts of appeal, and,

(3) the Petition does not present an important issue compelling action by this Court because both the standard of judicial review and the interpretation of the underlying statute proposed in the Petition have been rejected by every court which has considered the issue.

II. STATEMENT OF FACTS

The statement of facts by the Alliance Against IFQs ("Alliance") fails to explain the structure of the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act").[1] To manage the ocean fishery resources under United States jurisdiction, the Magnuson-Stevens Act divides the United States into eight geographic regions and creates a Regional Fishery Management Council ("Council") for each region.[2]

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1 16 U.S.C. 1801 *et. seq.*

2 16 U.S.C. 1852(a)(1), Appendix 1.

Each Council is to recommend to the Secretary of Commerce ("Secretary") management measures for each fishery in its region which requires conservation and management.[3] If the Secretary approves the management measures, the Secretary implements the management plan by regulation.[4] If the Secretary disapproves the management measures, the Secretary returns the plan to the Council for revision.[5]

The voting members of each Council are the appropriate regional director of the U.S. National Marine Fisheries Service ("NMFS"), the principal state official with marine fisheries management responsibility for each coastal state in the Council's region, and individuals appointed by the Secretary who are knowledgeable regarding the management, conservation or harvest of fishery resources by reason of their active participation or other experience in the fishery.[6]

The Individual Fishing Quota ("IFQ") Plan for the Fixed Gear Sablefish and Halibut Fisheries ("IFQ Plan") was initially developed by the North Pacific Fishery Management Council ("North Pacific Council"). The IFQ Plan has two components, one governing sablefish and one governing halibut. Each was approved by the Secretary under a different statute. The IFQ Plan for sablefish was approved

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3 16 U.S.C. 1852(h)(1), Appendix 2.

4 16 U.S.C. 1854(a)(1), (3) and (4), Appendix 3.

5 *Id.*

6 16 U.S.C. 1852(b)(1), (2) and (5), Appendix 4.

under the Magnuson-Stevens Act. The IFQ Plan as it relates to halibut was approved under the Northern Pacific Halibut Act ("Halibut Act").[7]

Although Alliance omits from its statement of facts any discussion of the important reasons why the IFQ Plan was adopted: to prevent overfishing, to reduce overcapitalization, to stop wasteful fishing practices, and to end fatalities in the fishery; Alliance implies that Congress disapproved of the IFQ Plan when it passed the Sustainable Fisheries Act in 1996.[8] Any such implication is wrong. The specific reference to the IFQ Plan in the Sustainable Fisheries Act provides that the general prohibition on adopting any new IFQ proposal until October 1, 2000 should not be construed as prohibiting amendments to the IFQ Plan.[9] The Sustainable Fisheries Act also provided that nothing in that Act shall be construed to require a reallocation of IFQs.[10] Neither provision implies disapproval of the IFQ Plan. In fact, by exempting the IFQ Plan, these provisions imply approval of the IFQ Plan.

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7 16 U.S.C. 773c(c), Petition Appendix E.

8 Petition at 6 n.2

9 P.L. 104-297, Section 108(e), 110 Stat. 3576-77, Appendix 5.

10 Public Law 104-297, Section 108(i), 110 Stat. 3581, Appendix 5.

III. ARGUMENT

A. ALLIANCE CANNOT RAISE ARGUMENTS FOR THE FIRST TIME IN A PETITION FOR A WRIT OF CERTIORARI.

Nowhere before the District Court or the Court of Appeals did Alliance allege it would be denied procedural due process unless the court adopted a different standard of review.[11] Nor did Alliance's Petition for Rehearing and Suggestion of Rehearing En Banc present this issue.[12] Alliance is precluded from presenting arguments for the first time to this Court.[13]

It is also significant that the first question Alliance presents for review to this Court is discussed nowhere else in the Petition.

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[11] Brief of Points and Authorities in Support of the Alliance Against IFQs' Motion for Summary Judgment at 14-16, Appendix 6; Plaintiff Alliance Against IFQs Consolidated Reply to Defendants' and Intervenors' Oppositions to Plaintiffs' Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment and Plaintiffs' Opposition to Defendants' and Intervenors' Cross-Motions for Summary Judgment at 2-4, Appendix 7; Brief of Plaintiffs-Appellants Alliance Against IFQs *et. al*, at 7-9, Appendix 8; and Reply to Brief of Federal Appellees, to Brief of Intervenor-Defendant-Appellees Peter M. Knutsen, *et. al.*, to Brief of Intervenor-Defendant-Appellee Western Alaska Fisheries Development Association and to Response to the Amicus Curiae Brief of Trustees for Alaska at 2-6, Appendix 9.

[12] Petition for Rehearing and Suggestion of Rehearing En Banc at 13-15, Appendix 10.

[13] *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983); *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 147 n.2 (1970).

B. THE COURT BELOW APPLIED THE CORRECT STANDARD OF REVIEW.

The appropriate standard of judicial review under the Magnuson-Stevens Act, the "arbitrary and capricious test" of Section 706(2)(A) of the Administrative Procedure Act, is found in the Magnuson-Stevens Act itself.[14] The Halibut Act does not explicitly reference Section 706(2)(A), but, as Alliance has conceded, that standard of review applies under the Halibut Act.[15]

Pursuant to that standard, actions taken by the Secretary in exercising his or her fisheries management authority are subject to limited judicial review,[16] the court may only examine whether there is a rational basis for the agency's decision evidenced in the record and must be wary not to substitute its judgment for that of the Secretary.[17] The

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[14] 16 U.S.C. 1855(f)(1), Appendix 11.

[15] Brief of Points and Authorities in Support of the Alliance Against IFQs' Motion for Summary Judgment at 14-15, Appendix 6.

[16] *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir. 1991); see also, *Alaska Factory Trawlers Ass'n v. Baldridge*, 831 F.2d at 1460; *Maine v. Kreps*, 563 F.2d 1052, 1055 (1st Cir. 1977); *Southeastern Fisheries Ass'n, Inc. v. Mosbacher*, 773 F. Supp. 435, 439 (D.D.C. 1991), *aff'd* 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 2546, 135 L.Ed.2d 1066 (1996); *Louisiana v. Baldridge*, 538 F. Supp. 625, 628 (E.D. La. 1982); *Associated Vessels Services, Inc. v. Verity*, 688 F. Supp. 13, 17 (D.D.C. 1988).

[17] *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d at 1441; *see also, Alaska Factory Trawlers Association v.*

Footnote continued next page.

plaintiff bears the burden under this standard of judicial review,[18] which burden cannot be sustained by weighing the evidence in the record pro and con.[19] To the contrary, the plaintiff must show "that the record is devoid of reasonable evidence that would support the agency's decision."[20]

Alliance recognizes the District Court conducted its review in accordance with these standards.[21] Alliance also recognizes that the United States Court of Appeals for the Ninth Circuit correctly set forth the proper standard.[22]

Baldridge, 831 F.2d 1456, 1460 (9th Cir. 1987); *Northwest Environmental Defense Center v. Brennen*, 958 F.2d 930, 934 (9th Cir. 1992); *Organized Fishermen of Florida, Inc. v. Franklin*, 846 F. Supp. 1569, 1573 (S.D. Fla. 1994); *Parravano v. Babbitt*, 837 F. Supp. 1034, 1042 (N.D. Cal. 1993); *Southeastern Fisheries Ass'n, Inc. v. Mosbacher*, 773 F. Supp. at 439, *aff'd* 70 F.3d 539 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 2546, 135 L.Ed.2d 1066 (1996); *Louisiana v. Baldridge*, 538 F. Supp. at 628; *Maine v. Kreps*, 563 F.2d at 1055; *C&W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1562 (D.C. Cir. 1991).

[18] *Organized Fishermen of Florida, Inc. v. Franklin*, 846 F. Supp. at 1573; *United Boatmen of New Jersey v. Mosbacher*, 1992 U.S. Dist. LEXIS 664 (D.N.J. 1992).

[19] *State of Louisiana v. Verity*, 853 F.2d 322, 327 (5th Cir. 1988).

[20] *Organized Fishermen of Florida, Inc. v. Franklin*, 846 F. Supp. at 1573; *see also, State of Louisiana v. Verity*, 853 F.2d at 327 (an agency's decision "need not be ideal, so long as...the agency gave at least minimal consideration to relevant facts contained in the record.")

[21] Brief of Plaintiff-Appellants Alliance Against IFQs, et al. at 7, Appendix 8.

[22] *Id.*

Nevertheless, Alliance argues for the first time that the arbitrary and capricious standard of the Administrative Procedure Act somehow violates the due process clause of the United States Constitution.

The Petition is devoid of any citation to precedent supporting this argument which Alliance itself characterizes as "novel."[23] The arbitrary and capricious test is settled law and has been accepted as the appropriate standard by which to judge agency action by every court reviewing a fishery management measure.[24]

To salvage its argument, Alliance argues the arbitrary and capricious standard defers too much to the Secretary. According to Alliance, the problem is that the Secretary reviewed and approved the draft IFQ Plan prepared by the North Pacific Council, and therefore, the North Pacific Council's actions are really what is at issue.[25] Alliance's attempt to focus on the North Pacific Council's action ignores the fact that a Council's actions are not reviewable. It is the Secretary's action in implementing regulations, not the Council's actions in recommending a management plan to

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23 Petition at 9.

24 *See* notes 16-20 *supra*.

25 Petition at 11-12.

the Secretary, which is reviewable.[26] The Secretary's action is the final agency action. Alliance even seems to concede that point in its statement of the Questions Presented for Review where Alliance admits the North Pacific Council only "proposed" management measures to the Secretary.[27]

These rulings are consistent with the Magnuson-Stevens Act which specifies: "Regulations promulgated by the Secretary under this Act ... shall be subject to judicial review...."[28] No provision is made for judicial review of a Council's recommendation to the Secretary.

Nevertheless, Alliance argues that some members of the North Pacific Council were active participants, and had financial interests, in the fisheries. Alliance concludes that this circumstance precludes use of the arbitrary and capricious standard of review and requires the courts to treat the Council, not the Secretary, as the decisionmaker.

Not only are several links missing from Alliance's legal argument, but Alliance overlooks certain facts. Although Alliance alleges conflicts of interest among some

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26 *Alaska Factory Trawler Association v. Baldridge*, 831 F.2d at 1460, 1464; *Louisiana v. Baldridge*, 538 F. Supp. at 630 n. 1; *National Fisheries Institute v. Mosbacher*, 732 F. Supp. 210, 217 (D.D.C. 1990); *Associated Vessel Services, Inc. v. Verity*, 688 F. Supp. at 16; *Washington Trollers Association v. Kreps*, 466 F. Supp. 309, 312 (W.D. Wash. 1979), *rev'd on other grounds*, 645 F.2d 684 (9th Cir. 1981).

27 Petition at (i).

28 16 U.S.C. 1854(f)(1), Appendix 11.

North Pacific Council members, Alliance forgets that before the District Court Alliance admitted there was no suggestion of "unprincipled behavior" by members of the North Pacific Council.[29]

Alliance also ignores the structure of the Magnuson-Stevens Act which requires that Council members "be individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable" about fisheries management issues.[30] In appointing Council members, the Secretary is to "ensure a fair and balanced apportionment...of the active participants (or their representatives) in the commercial and recreational fisheries" under the Council's jurisdiction.[31] Furthermore, no individual is eligible for appointment until he or she complies with financial interest disclosure requirements.[32] Finally, if a sitting Council member fails to provide the required financial interest disclosures, the participation of that person in a Council action "during any time that individual is not in compliance...may not be treated as cause

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29 Consolidated Reply to Defendants' and Intervenors' Oppositions to Plaintiffs' Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment and Plaintiffs' Opposition to Defendants' and Intervenors' Cross-Motions for Summary Judgment at 6-7, Appendix 12.

30 16 U.S.C. 1852(b)(2)(A), Appendix 4. (Emphasis added.)

31 16 U.S.C. 1852(b)(2)(B), Appendix 4.

32 16 U.S.C. 1852(b)(2)(C), Appendix 4.

for the invalidation of that action."[33] While Alliance complains that North Pacific Council members were fishermen, Alliance forgets that Congress has explicitly provided for the appointment of Council members who are active participants in the regulated fisheries.

Nevertheless, Alliance cites *Withrow v. Larkin*[34] for the proposition that biased decisionmaking is improper. Although Alliance recognizes the distinction between agency adjudication and rulemaking, Alliance asserts it is of no impact. To the contrary, rulemaking requires interested and informed decisionmakers and rulemaking procedures are not held to the same standards as adjudicatory proceedings[35] --- particularly when Congress has mandated the participation of interested parties.

C. THE REGULATION IMPLEMENTING THE IFQ PLAN DOES NOT VIOLATE ANY STATUTORY MANDATE

1. The Secretary Complied With The Requirement That Allocations Be Fair and Equitable.

Alliance argues that the IFQ Plan violated that portion of the Magnuson-Stevens Act and the Halibut Act

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33 16 U.S.C. 1852(j)(6), Appendix 13.

34 421 U.S. 35 (1975), Petition at 10.

35 *Harry & Bryant Co. v. FTC*, 726 F.2d 993, 998-99 (4th Cir. 1984), *cert. denied*, 469 U.S. 820 (1984).

providing that an allocation must be fair and equitable to "all [U.S.] fishermen."[36] Alliance asserts the IFQ Plan is not fair and equitable to "all" fishermen because the IFQ Plan did not make crew and skippers eligible for an initial allocation of quota shares ("QS")[37], although crew members and skippers could purchase QS after the initial allocation. Alliance's argument appears to be that an IFQ plan fails the fair and equitable requirement unless every class of participants in the fishery has some part of the pie when it is first divided.

Alliance's argument has been rejected in the regulations implementing the Magnuson-Stevens Act and the Halibut Act and by every court which has considered Alliance's argument. The regulations explaining the fair and equitable standard state that "inherent in an allocation is the advantaging of one group to the detriment of another."[38] The regulations also provide that an allocation "may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups."[39] Courts have uniformly held that if a Fishery Management Plan ("FMP") has positive net benefits, the allocation will satisfy the fair

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36 Petition at 17-18.

37 A quota share is a percentage which, when applied to the annual allowable harvest, results in an IFQ.

38 50 C.F.R. 602.14(c)(3)(i)(A), Appendix 14.

39 50 C.F.R. 602.14(c)(3)(i)(B), Appendix 15.

and equitable requirement even if it eliminates individuals or an entire user group from the fishery.[40] When the United States Court of Appeals for the Ninth Circuit rejected Alliance's argument it was in accord with uniform judicial precedents.

Alliance's attempt to argue that the court below actually found the IFQ Plan violated the fair and equitable standard is not fully consistent with the court's decision. The court stated that allocating all IFQ shares to owners and lessees, and none to crew, appeared to violate "the statutory command of fairness and equity to 'all' fishermen."[41] But with its next breath the court found the fair and equitable standard cannot be considered in isolation from other standards governing approval of FMPs and that these various standards have competing and conflicting objectives.[42] The

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40 *Alaska Factory Trawler Association v. Baldridge*, 831 F.2d at 1460 (FMP excluded pot fishermen and trawlers from the fishery); *National Fisheries Institute v. Mosbacher*, 732 F. Supp. at 225-26 (commercial fishermen excluded from the Atlantic Ocean and Gulf of Mexico billfish fishery); *C&W Fish Company v. Fox*, 931 F.2d 1556, 1563-64 (D.C. Cir. 1991) (drift gillnet fishermen banned from the Atlantic king mackerel and coastal pelagic fishery); *Sea Watch International v. Mosbacher*, 762 F. Supp. 370, 378 (D.D.C. 1991) (challenge to an individual fishing quota plan based on allegations that it would drive single vessel owners and small fleet owners from the fishery rejected because inherent in an allocation is the advantaging of one group to the detriment of another).

41 *Alliance Against IFQs v. Brown*, 84 F.3d 343, 348 (9th Cir. 1996).

42 *Id.* at 348-349.

court stated the Secretary's duty is not only to be fair and equitable but also to prevent overfishing, promote conservation, promote efficiency, minimize costs, and achieve other criteria.[43] The court concluded there is a tension and inconsistency among these objectives which "necessarily requires that each goal be sacrificed to some extent to meeting the others."[44]

The court then quoted that portion of the regulations providing that an allocation of fishing privileges may impose a hardship on one group if it is outweighed by the plan's total benefits[45] and rejected Alliance's argument stating:

> The Secretary is allowed ... to sacrifice the interests of some groups of fishermen, for the benefit as the Secretary sees it of the fishery as a whole.[46]

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43 *Id.*

44 *Id.* at 349.

45 *Id.* at 349-350.

46 *Id.* at 350, citing *Alaska Factory Trawlers Ass'n v. Baldridge*, 831 F.2d at 1460. The court's view that the standards governing approval of FMPs have competing objectives which require balancing was validated in the legislative history of the Sustainable Fisheries Act. The Senate Report explaining an amendment to one such standard states:

> The goal of this amendment is not to eliminate efficiency as a consideration in the development of plans and regulations, but rather to ensure that it is balanced with the requirements of other national standards.

Footnote continued next page.

Finally, the court found the Secretary was neither arbitrary nor capricious in determining that the overall benefit to the fishery as a whole justified the IFQ Plan.[47] Nowhere does the Petition challenge the finding that the overall benefits of the IFQ Plan outweigh any detriment which may occur to individual participants. Moreover, Alliance's claim that crew members and skippers are "barred" from the IFQ fishery is wrong.[48] The IFQ Plan permits crew members to purchase quota shares.[49] In fact, only crew members and initial catcher vessel QS recipients are eligible to purchase catcher vessel QS.[50] Furthermore, the IFQ Plan allows crew-owned catcher vessel QS to be used on a freezer vessel which enhances opportunities for crew members to purchase and use QS.[51] Alliance also ignores the fact that one of the purposes of the IFQ Plan was to reduce overcapitalization in the fishery and that crew members and skippers, unlike owners and leaseholders who were eligible for initial QS, do not provide the capital or make the decisions by which vessels enter or exit the fishery.[52]

S. Rep. No. 276, 104th Cong., 2d Sess., at 13.

47 *Alliance Against IFQs v. Brown*, 84 F.3d at 350.

48 Petition at 5.

49 50 C.F.R. 676.21(b), Petition Exhibit K at 271a.

50 *Id.*

51 57 Fed. Reg. 57139 (Dec. 3, 1992), Appendix 16.

52 58 Fed. Reg. 59375, 59380 (Nov. 9, 1993), Petition Exhibit K at 98a-100a; see also 58 Fed. Reg. at 59385 (comment 11), Petition Exhibit K at 129a-131a.

2. The Secretary Complied With The Requirement To Consider Present Participation In The Fishery.

Alliance next argues that when the Secretary implemented the IFQ Plan the Secretary failed to consider the present participation of crew members and skippers. Again, Alliance bases its argument on the fact that crew members and skippers were not eligible to receive initial QS unless they were also vessel owners or leaseholders.[53]

Section 303(b)(6) of the Magnuson-Stevens Act provides that in developing a limited access system the Council and the Secretary shall "take into account" several factors including present participation in the fishery.[54] The Halibut Act provides that any limited access system established under that Act "shall be consistent with the limited entry criteria set forth in section 1853(b)(6) of [the Magnuson-Stevens Act]."[55]

For purposes of Section 303(b)(6), "take into account" means only that the factors be considered.[56]

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53 Petition at 20.

54 16 U.S.C. 1853(b)(6), Petition Appendix G.

55 16 U.S.C. 773c(c), Petition Appendix E.

56 *Pacific Coast Fed'n of Fishermen's Ass'n. v. Secretary of Commerce*, 494 F. Supp. 626, 631 (N.D. Cal. 1980), *citing* H.R. Rep. No. 445, 94th Cong., 2d Sess. 66, reprinted in 1976 U.S. Code Cong. & Admin. News, pp. 593, 634-35.

Curiously, the brief submitted by the Alliance to the District Court explained, in part, the reasoning used by the North Pacific Council and the Secretary in making their decisions.[57] Alliance may disagree with the Secretary's conclusions, but Alliance itself documents that the Section 303(b)(6) factors were considered, thus satisfying the appropriate legal standard.

The preamble to the final rule implementing the IFQ Plan also demonstrates the Section 303(b)(6) standard was met. The preamble devotes over nine columns of text to discussing Section 303(b)(6) issues, including the participation of crew members and skippers and the reasons for the decisions regarding crew members and skippers.[58] Alliance's attempt to argue the Secretary did not consider all the relevant present participation issues is fatally flawed.

The United States Court of Appeals for the Ninth Circuit dealt with this issue as part of its discussion of the fair and equitable issue. The court found the Secretary had in fact considered the interests of crew members[59] but had reasonably determined that to reduce overcapitalization in

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[57] Brief of Points and Authorities in Support of Alliance Against IFQs' Motion for Summary Judgment at 65-67, Appendix 17.

[58] 58 Fed. Reg. at 59379-59381, 59383 (Comment 3), 59385-86 (Comments 10-14) and 59394 (Comment 60); Petition Exhibit K at 95a-100a, 119a-120a, 128a-137a, and 182a-184a.

[59] *Alliance Against IFQs v. Brown*, 84 F.3d at 350.

the fishery it was necessary to allocate IFQs to the individuals who decided whether a vessel would participate in the fishery, *i.e.*, vessel owners and leaseholders.[60]

After focusing on crew and skippers specifically, Alliance makes a second present participation argument which is that neither the North Pacific Council nor the Secretary considered the present participation of fishermen generally because the IFQ Plan sets 1990 as the last qualifying year for QS eligibility. Alliance finds fault because a person who fished continuously from 1991 through 1995, when the IFQ Plan was implemented would not qualify for QS.[61]

The Administrative Record demonstrates this aspect of Alliance's present participation argument was fully evaluated and considered, thereby satisfying Section 303(b)(6). As explained in the Final Supplemental Environmental Impact Statement/Environmental Impact Statement and the preamble to the final rule implementing the IFQ Plan, extending the qualifying period beyond 1990 would have provided an incentive for additional people to enter the fishery, and for previous entrants to adopt extreme fishing practices to increase their overall share of "historical"

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60 *Id.* at 349.

61 Petition at 19-20.

landings.[62] Either event would have exacerbated the conservation and overcapitalization problems the IFQ Plan sought to solve.[63] Not only does the record demonstrate that the present participation issue was considered but even Alliance recognizes "some cut-off date is not unreasonable."[64] Moreover, when the North Pacific Council recommend the IFQ Plan to the Secretary in December 1991 the most recent year for which complete data was available was 1990.[65]

Alliance claims to find support for its position in *Sea Watch Int'l v. Mosbacher*[66] where the court upheld a limited access system against a challenge based on an alleged failure to consider present participation. Alliance notes the cut-off date for eligibility in the *Sea Watch* limited access plan was two years before the plan was implemented. Alliance misses

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62 Final Supplemental Environmental Impact Statement/Environmental Impact Statement for the Individual Fishing Quota Management Alternative for Fixed Gear Sablefish and Halibut Fisheries, Gulf of Alaska and Bering Sea/Aleutian Islands, September 15, 1992, at 2-23, Appendix 18; 58 Fed. Reg. at 59380, Petition Exhibit K at 98a-99a.

63 58 Fed. Reg. at 59386 (comment 12), Petition Exhibit K at 132a-133a.

64 Petition at 21.

65 58 Fed. Reg. at 59386 (comment 12), Petition Exhibit K at 132a-133a.

66 762 F. Supp. 370 (D.D.C. 1991)

two central points. First, the court did not say cut-off dates more than two years old were automatically invalid. Second, the *Sea Watch* court did say:

> As long the Council and the Secretary took [the Section 303(b)(6) factors] into account, the Court may not second-guess the accuracy of the balance struck.[67]

Here, the Secretary and the North Pacific Council clearly considered and rejected Alliance's argument, striking a balance in favor of not encouraging more entrants into fisheries which already had too many participants.

In considering Alliance's present participation argument, the United States Court of Appeals for the Ninth Circuit found the Secretary reasonably concluded that allowing later entrants to be eligible for QS would have encouraged the speculative overinvestment and overfishing which the IFQ Plan was intended to restrain.[68] The court thus rejected Alliance's contention that the administrative delay in implementing the plan meant present participation was not considered.

The court also noted the participation considered by the North Pacific Council was roughly present participation when the Secretary issued proposed regulations

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67 *Id.* at 379.

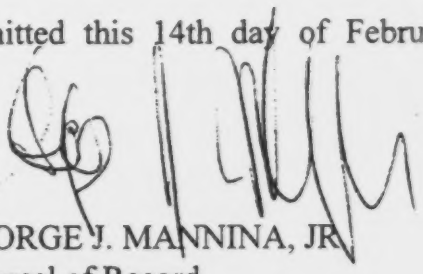
68 *Alliance Against IFQs v. Brown*, 84 F.3d at 347-348.

implementing the IFQ Plan. The court pointed out that the process of moving from proposed to final regulations can require substantial amounts of time and, therefore, the word "present" cannot prudently be contemporaneous with the promulgation of final regulations.[69]

IV. CONCLUSION

Alliance's Petition should be denied because (1) it presents certain issues for decision which were not raised below, (2) there is no conflict among the courts of appeal, and (3) there is no important issue compelling action by this Court because Alliance's requested standard of judicial review and statutory interpretations are incorrect and have been uniformly rejected by courts which have considered the issue.

Respectfully submitted this 14th day of February, 1997.



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69 *Alliance Against IFQs v. Brown*, at 347.

APPENDIX

APPENDIX 1 - 16 U.S.C. 1852(a)(1).

(a)(1) ESTABLISHMENT.--There shall be established, within 120 days after the date of the enactment of this Act, eight Regional Fishery Management Councils, as follows:

. . .

(G) NORTH PACIFIC COUNCIL.--The North Pacific Fishery Management Council shall consist of the States of Alaska, Washington, and Oregon and shall have authority over the fisheries in the Arctic Ocean, Bering Sea and Pacific Ocean seaward of Alaska. The North Pacific Council shall have 11 voting members, including 7 appointed by the Secretary in accordance with subsection (b)(2) (5 of whom shall be appointed from the State of Alaska and 2 of whom shall be appointed from the State of Washington)....

APPENDIX 2 - 16 U.S.C. 1852(h)(1).

(h) FUNCTIONS.--Each Council shall, in accordance with the provisions of this Act--

(1) for each fishery under its authority that requires conservation and management, prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed);....

APPENDIX 3 - 16 U.S.C. 1854(a)(1), (3) and (4).

Section 304. Action by Secretary.

(a) REVIEW OF PLANS.--

(1) Upon transmittal by the Council to the Secretary of a fishery management plan or plan amendment, the Secretary shall--

(A) immediately commence a review of the plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law; and

(B) immediately publish in the Federal a notice stating that the plan or amendment is available and that written information, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 60-day period beginning on the date the notice is published....

(3) The Secretary shall approve, disapprove, or partially approve a plan or amendment within 30 days of the end of the comment period under paragraph (1) by written notice to the Council. A notice of disapproval or partial approval shall specify--

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistencies; and

(C) recommendations concerning the actions that could be taken by the Council to conform such plan or amendment to the requirements of applicable law.

If the Secretary does not notify a Council within 30 days of the end of the comment period of the approval, disapproval, or partial approval of a plan or amendment, then such plan or amendment shall take effect as if approved.

(4) If the Secretary disapproves or partially approves a plan or amendment, the Council may submit a revised plan or amendment to the Secretary for review under this subsection....

APPENDIX 4 - 16 U.S.C. 1852(b)(1), (2) and (5).

(b) VOTING MEMBERS.--

(1) The voting members of each Council shall be:

(A) The principal State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State, so long as the official continues to hold such position, or the designee of such official.

(B) The regional director of the National Marine Fisheries Service for the geographic area concerned, or his designee, except that if two such directors are within such geographical area, the Secretary shall designate which of such directors shall be the voting member.

(C) The members required to be appointed by the Secretary in accordance with paragraphs (2) and (5).

(2)(A) The members of each Council required to be appointed by the Secretary must be individuals who, by reason of their occupational or other experience, scientific expertise, or training, are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned. Within nine months after the date of enactment of the Fishery Conservation Amendments of 1990, the Secretary

shall, by regulation, prescribe criteria for determining whether an individual satisfies the requirements of this subparagraph.

(B) The Secretary, in making appointments under this section, shall, to the extent practicable, ensure a fair and balanced apportionment, on a rotating or other basis, of the active participants (or their representatives) in the commercial and recreational fisheries under the jurisdiction of the Council....

(C) The Secretary shall appoint the members of each Council from a list of individuals submitted by the Governor of each applicable constituent State. A Governor may not submit the names of individuals to the Secretary for appointment unless the Governor has determined that each such individual is qualified under the requirements of subparagraph (A) and unless the Governor has, to the extent practicable, first consulted with representatives of the commercial and recreational fishing interests of the State regarding those individuals. Each such list shall include the names and pertinent biographical data of not less than three individuals for each applicable vacancy and shall be accompanied by a statement by the Governor explaining how each such individual meets the requirements of subparagraph (A) The Secretary shall review each list submitted by a Governor to ascertain if the individuals on the list are qualified for the vacancy on the basis of such requirements. If the Secretary determines that any individual is not qualified, the Secretary shall notify the appropriate Governor of that determination. The

Governor shall then submit a revised list or resubmit the original list with an additional explanation of the qualifications of the individual in question. An individual is not eligible for appointment by the Secretary until that individual complies with the applicable financial disclosure requirements under subsection (k)....

(5)(A) The Secretary shall appoint to the Pacific Council on representative of an Indian tribe with Federally recognized fishing rights from California, Oregon, Washington, or Idaho from a list of not less than 3 individuals submitted by the tribal governments. The Secretary, in consultation with the Secretary of the Interior and tribal governments, shall establish by regulation the procedure for submitting a list under this subparagraph....

APPENDIX 5 - Sustainable Fisheries Act, P.L. 104-297, Section 108(e), 110 Stat. 3576-77.

(e) INDIVIDUAL FISHING QUOTAS.--Subsection 303 (16 U.S.C. 1853) is amended further by striking subsections (d), (e), and (f), and inserting the following:

"(d) INDIVIDUAL FISHING QUOTAS.--

"(1)(A) A Council may not submit and the Secretary may not approve or implement before October 1, 2000, any fishery management plan, plan amendment, or regulation under this Act which creates a new individual fishing quota program....

"(2)(A) No provision of law shall be construed to limit the authority of a Council to submit and the Secretary to approve the termination or limitation, without compensation to holders of any limited access system permits, of a fishery management plan, plan amendment, or regulation that provides for a limited access system, including an individual fishing quota program...."

(i) EXISTING QUOTA PLANS.--Nothing in this Act or the amendments made by this Act shall be construed to require a reallocation of individual fishing quotas under any individual fishing quota program approved by the Secretary before January 4, 1995.

APPENDIX 6 - Brief of the Points and Authorities In Support Of The Alliance Against IFQs' Motion for Summary Judgment at 14-16, dated June 17, 1994.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALLIANCE AGAINST IFQS, et al. Plaintiffs,	)
v.	) No. A93-480 CV (JKS)
RONALD H. BROWN, Secretary of Commerce, et al., Defendants.	) BRIEF OF THE POINTS) AND AUTHORITIES IN) SUPPORT OF THE) ALLIANCE AGAINST) IFQS' MOTION FOR) SUMMARY JUDGMENT

B. Standard of Review

Actions taken by the Secretary of Commerce under the Magnuson Act and the Halibut Act are subject to judicial review. 16 U.S.C. § 1855(b), 5 U.S.C. § 706. The standard of review under both acts is the same. The Magnuson Act explicitly adopts the judicial review standards found in the Administrative Procedure Act. 16 U.S.C. § 1855(b)(1). The Halibut Act does not contain a specific provision setting out standards for judicial review for challenges to administrative rulemakings and therefore the APA standards apply. Thus, the IFQ rule must be invalidated it if is (1) arbitrary and capricious or an abuse of discretion, (2) unconstitutional, (3) in excess of statutory jurisdiction, or (4) was promulgated without observance of procedure required by law. Id.; 5 U.S.C. § 706(2); see also Northwest Envtl. Defense Ctr. v. Brennan, 958 F.2d 930, 934 (9th Cir. 1992); National Fisheries Inst., Inc. v. Mosbacher, 732 F. Supp. 210, 219 (D.D.C. 1990) (Magnuson Act requires court to apply the traditional APA standard of review).

To determine whether an agency's actions were arbitrary and capricious, a reviewing court must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Natural Resources Defense Council, Inc. v. EPA, 790 F.2d 289 (3d Cir. 1986) (EPA regulation designed to enforce Clean Water Act was arbitrary and capricious because agency failed to consider an important aspect of the problem and offered an inadequate explanation for the regulation); Natural Resources Defense Council, Inc. v. EPA, 822 F.2d 104 (D.C. Cir. 1987) (agency rule is

arbitrary and capricious if agency relies upon improper facts, ignores important arguments or fails to articulate reasoned basis for rule).

The reviewing court need not limit its inquiry into the agency's findings of fact. See Washington Ass'n for Television & Children v. FCC, 712 F.2d 677 (D.C. Cir. 1983). It is the function of the reviewing court to searchingly and carefully scrutinize the entire record in order to determine whether the agency's conclusions are draw from the facts. Citizens to Preserve Overton Park, Inc., 401 U.S. at 415. The reviewing court is required to give the agency's action "a thorough, probing, in-depth review." Id.

Moreover, an agency rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem." Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1982).[3] "[T]he agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.'" Id. at 52 (quoting Burlington Truck Lines); see also Northwest Motorcycle Ass'n v. U.S. Dep't of Agriculture, 18 F.3d 1468 (9th Cir. 1994) (citing cases).

This Court must invalidate the IFQ rule because neither the Council, in developing the FMP, nor the Secretary of Commerce, in reviewing the FMP and promulgating the regulations, considered all of the relevant

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[3] In Motor Vehicle Mfrs., the Supreme Court found that the National Highway Traffic Safety Administration's ("NHTSA's") rescission of a passive restraint regulation was arbitrary and capricious because "NHTSA apparently gave no consideration whatever to modify the Standard to require that airbag technology be utilized." Id. at 46.

factors in arriving at their decisions. As this memorandum demonstrates in the argument below, many central issues were either ignored, superficially considered, or handled in a procedurally defective manner. Because of the many flaws in the analysis and decisions-making process which produced this rule, if cannot be upheld.

APPENDIX 7 - Plaintiff Alliance Against IFQs' Consolidated Reply To Defendants' And Intervenors' Oppositions To Plaintiffs' Motion For Summary Judgment And Plaintiffs' Opposition To Defendants' And Intervenors' Cross-Motions For Summary Judgment at 2-4, dated August 16, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALLIANCE AGAINST IFQS, et al.	) No. A93-480 CV (JKS)
Plaintiffs,	) PLAINTIFF ALLIANCE AGAINST IFQS' CONSOLIDATED REPLY TO DEFENDANTS' AND INTERVENORS' OPPOSITIONS TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' OPPOSITION TO DEFENDANTS' AND INTERVENORS' CROSS-MOTIONS FOR SUMMARY JUDGMENT
v.	
RONALD H. BROWN, Secretary of Commerce, et al.,	
Defendants.	

At the outset, it is important to correct the views of opposing parties as to what result this lawsuit seeks to obtain and the reasons why it was filed. Contrary to Knutsen's concluding statement, the only alternative to the upholding of the IFQ scheme is not a return to the "status quo open access derby style fishery" which has occurred in the past. See, Knutsen Mem. at 85.[2] Federal defendants and Knutsen catalogue a host of ills which have purportedly characterized the sablefish and halibut fisheries, but pose only a straw man alternative (the status quo) to the program actually promulgated. Plaintiffs do not dispute that some serious problems have developed in these fisheries in recent years and do not necessarily advocate a return to the status quo. What they do advocate is a rational and objective evaluation of all factors necessary to assure the legality and effectiveness of whatever management scheme is eventually adopted. Particularly close examination of agency decision-making is necessary here, where the Council conducted the bulk of the analysis and preparation of the IFQ plan. Recent congressional testimony by the Inspector General of the Department of Commerce addressed the question of financial conflicts of interest among regional fishery management councils, including the North Pacific Fishery Management Council. See Testimony of Frank DeGeorge, attached hereto

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2 Throughout this reply brief the memoranda of law filed by the other parties in this case will be referred to as follows: The federal defendants' memorandum of law will be cited as "Def. Mem.", the Knutsen intervenors' memorandum of law will be cited as "Knutsen Mem.", and WAFDA's memorandum of law will be cited as "WAFDA Mem." The plaintiffs' brief in support of their motion for summary judgment will be cited as "Pl. Mem."

as Exhibit A. In examining the Council decision-making process in the inshore/offshore rulemaking, the Inspector General found no evidence that council members made decisions in that situation to maximize their own financial interests, but recommended that federal conflicts of interest laws that apply to other federal operations should be applied to fishery management councils as well.

The Inspector General further noted that the statutory waiver of conflicts of interest rules in the Magnuson Act is the only example of federal law of a direct statutory blanket exemption from the prohibitions against conflicts of interest applying to other federal officials: "In other words, in order to have faith in the decisions being made, the public must perceive that those in charge of approving and implementing a plan are free of direct financial benefits that would influence them to favor individual benefit over the general good." Exhibit A at 4.

Given the Inspector General's concern over the integrity of the Council decision-making process, even in the context of subsequent Secretarial review of fishery management plans, the court may wish to undertake a more searching examination of the agency decision in this matter than would otherwise be the case. The opposing parties' rote invocation of the arbitrary and capricious standard of review should be analyzed in the context of the unique circumstances of fishery management council decision-making. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) (reviewing court is required to give agency's action "a thorough, probing, in-depth review").

APPENDIX 8 - Brief of Plaintiffs - Appellants Alliance Against IFQs, et al., at 7-9, dated April 26, 1995.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 95-35077

ALLIANCE AGAINST IFQS; ET AL.;
Plaintiff - Appellants;
v.
RONALD H. BROWN, Secretary of Commerce; CLARENCE B. PAUTZKE, Executive Director North Pacific Fisheries Management Council; WESTERN ALASKA FISHERIES DEVELOPMENT ASSOCIATION;
Defendants - Appellees;
and
PETER M. KNUTSEN; EDWIN FUGLVOG; ROBERT J. WURM; ANDREW SCALZI; NANCY PHILLIPS; et. al.;
Defendant - Intervenors -Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA
THE HONORABLE JAMES K. SINGLETON, JR., JUDGE

BRIEF OF PLAINTIFFS - APPELLANTS ALLIANCE AGAINST IFQS; ET AL.

A. Standard of Review.

A grant of Summary Judgment is reviewed de novo. The arguments that the Secretary violated the FCMA by changing the port clearance requirement and by failing to hold preemption hearings will be decided based on statutory interpretation. No discretion should be given to the Secretary. Washington Crab Producers v. Mosbacher, 924 F.2d 1438, 1440 (9th Cir. 1991).

The Ninth Circuit has held that it will review administrative actions within the discretion of the Secretary of Commerce under the FCMA only for reasonableness. Id. at 1441. The Alliance asserted below that the reviewing court should give the agency's action a thorough, probing in depth review, because of the unique circumstances of fishery management council decision-making. ER-IV. at 4. However, the District Court based its conclusions on "whether the Secretary has considered the relevant factors and articulated a rational connection between the facts found and the judgments made." ER-VI at 9.

This standard defers too much to the NPFMC as it developed and implemented a plan to privatize a billion dollar fishery, particularly where Council members had direct and indirect financial interest in the outcome.

The Ninth Circuit has recognized a "less deferential" standard of review where an employee benefits plan administrator is operating under a conflict of interest. Atwood v. Newmont Gold Co., 45 F.3d 1317, 1322 (9th Cir. 1995). If the reviewing court determines that self-interest

caused a breach of duty, the court will look "very skeptically" in deferring to the discretion of the administrator. Id. at 1323. The burden of proof shifts to the administrator to show that the conflict of interest did not affect the decision. Id. This Court has recognized that a heightened standard of review may be appropriate where the decision would affect the individual decision-maker financially. Id., citing Fielding v. International Harvesters, 755 F.2d 708 (9th Cir. 1985). Here, a review of the voting on the Alaska halibut and sablefish IFQ plan is enlightening. In the December 1991 final IFQ vote, 6 of the 7 "yes" votes were made by members who had an interest in the outcome.

(1) Bob Alverson, who represented longliners, is executive director of the Fishing Vessel Owner's Association, whose approximately sixty members receive a large portion of these shares.

(2) Joe Blum, who upon leaving the Council immediately became a council lobbyist for American Factory Trawlers Association.

(3) Larry Cotter, a consultant, who upon leaving the Council formed the largest brokerage devoted to the transfer and sales of IFQs.

(4) Ron Hegge, who represented longliners, owns freezer longliners and received IFQs.

(5) Wally Pereyra, who represented the factor trawlers and as a multi-vessel owner. He said he wanted this plan so it would allow him to get trawl IFQs for his factory trawl fleet.

(6) Clem Tillion had been appointed to fill the Alaska State seat. His family members received large IFQ shares. ER-XI, tab 9.

APPENDIX 9 - Reply to Brief of the Federal Appellees, to Brief of Intervenor-Defendant-Appellees Peter M. Knutsen, et al., to Brief of Intervenor-Defendant-Appellee Western Alaska Fisheries Development Association, and to Response to the Amicus Curiae Brief of Trustees for Alaska at 2-6, dated July 11, 1995.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 95-35077

ALLIANCE AGAINST IFQS; et. al.;
Plaintiff - Appellants;
v.
RONALD H. BROWN, Secretary of Commerce; et. al.;
Defendants - Appellees;
and
PETER M. KNUTSEN; et. al.;
Defendant - Intervenors -Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ALASKA
THE HONORABLE JAMES K. SINGLETON, JR., JUDGE

REPLY TO BRIEF OF THE FEDERAL APPELLEES, TO BRIEF OF INTERVENOR-DEFENDANT-APPELLEES PETER M. KNUTSEN, ET AL., TO BRIEF OF INTERVENOR-DEFENDANT-APPELLEE WESTERN ALASKA FISHERIES DEVELOPMENT ASSOCIATION, AND TO RESPONSE TO THE AMICUS CURIAE BRIEF OF TRUSTEES FOR ALASKA

II. Standard of Review.

A. No deference should be accorded the Secretary. Should the Court apply a deferential standard of judicial review, however, there is ample reason to reject the Secretary's acts as unreasonable.

The Government agrees that the Secretary must "take into account" any data, views or comments received. Government's brief at 6. This court must examine the Secretary's review, and neither counsel nor the court can supply or rely on any reasoning that does not appear in the record.[2]

On this point, the Alliance directs this Court's attention to three issues: the addition of the Bellingham port, the allocation of all quota shares ("QS") to vessel owners, and the conflict of interest within the Council.

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2 See American Min. Congress v. U.S.E.P.A., 907 F.2d 1179 (C.A.D.C. 1990) (Deference to agency does not require Court of Appeals to abdicate judicial duty carefully to review record to ascertain that agency has made reasoned decision based on reasoned extrapolations from some reliable evidence to ensure that agency has examined relevant data and articulated satisfactory explanation for its action including rational connection between facts found and choice made); State of Maine v. Kreps, 563 F.2d 11052, 1056 (1st Cir. 1977) ("[Secretary's] reasoning [must] appear with sufficient clarity in the record for a court to review [Secretary's compliance with Congressionally declared standards and objectives])."

1. **The Addition of the Bellingham port.**

No party to this proceeding has cited a single page in the administrative record that shows **any** analysis by the Secretary regarding what impact adding Bellingham as a primary port would have on the IFQ program. The Alliance, the Government, the Intervenors and the District Court argued with each other about the impact the change would have on the enforcement mechanism originally presented to the Secretary by the Council, and we disagreed about whether the changes ultimately required in the enforcement mechanism would render it ineffective. Yet the Secretary did not examine these potential impacts before amending the program. In fact, in the preamble to the final rule, the Secretary stated that there would be no change in enforcement from the proposed to the final rule. ER-II, tab 26 at 590381.[3]

2. **The allocation of quota shares.**

The District Court concluded that the Secretary allocated QS to vessel owners because of "administrative convenience." This rationale appears no where in the record. Hudson Transit Lines, Inc. v. U.S.I.C.C., 765 F.2d 329 (C.A.D.C. 1985) ("reviewing court may not supply basis for agency's decision." Instead, the record acknowledges that this decision was made "to award investors." [sic] ER-II, tab 26 at 59380.

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[3] This proved to be untrue. The Council has changed the enforcement mechanism. Government's Brief at 29.

In fact, the rule did not reward all of the "investors," it rewarded only vessel owners and lessees. The rule ignored captains and crew, who also were investors in the fishery. As the Alliance pointed out to the District Court, hired skippers and crew were "partners" with vessel owners in each season's fishing venture. They share costs and profits. If there were no profits, they received nothing for their labors. ER-I, tab IV, Ex. C. at 2-3, Ex F at 2, Ex. H at 3-4.

National Standard 4 requires a "fair and equitable [allocation] to all fishermen." 50 C.F.R. § 602.10(a)(3). The Alliance argued the Secretary could not reasonably have determined that the IFQ program is consistent with National Standard 4. An analysis of the largest allocations by the Anchorage Daily News indicates that the Alliance was right.[4] It reported that a mere forty vessel owners received harvest rights valued at $100 million. Sixth place in the halibut list was a group of Anchorage lawyers. As Larry Cotter, a member of the Council who voted in favor of the IFQ plan, noted "[a] lot of [small boat fishermen] . . . cannot have a viable fishery. Addendum 1 at 2.

The Government describes the District Court's oral "tentative decision" and Order as an explanation and "written response" to the arguments posed by the Alliance in the court below. Government's brief at 5. The District Court's decision provides little or no legal analysis. Instead, it

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[4] A court may consider information subsequent to a decision if it bears directly upon the plausibility of predictions made in promulgatory regulations. Sea Watch International v. Mosbacher, 762 F.Supp. 370, 381 (D.D.C. 1991).

addresses arguments presented by the Alliance summarily, glibly and dismissively. The District Court talked about "flying unicorns" and "red herrings." It accused NMFS chief enforcement officer of wanting "to have the entire United States Navy available for his enforcement." There was no thoughtful analysis of the Secretary's review and action.

3. The conflict of interest within the Council.

In adopting the Council's recommendations, the Secretary overlooked a critical aspect of the Council's deliberative process: namely, that a serious conflict of interest existed on the Council, given membership on the Council by individuals who had a clearly defined and sizable economic stake in the outcome.

Alliance recognizes that the Magnuson Act allows Council members to be individuals who by reason of their occupational or other experience are knowledgeable about fisheries management issues. 16 U.S.C. 1852(b)(2)(A). However, when Council members' financial interests are intimately intertwined with proposals by the Council to the Secretary, the public arguably has a right to expect such members to recuse themselves. Without such a recusal, the Secretary at least should recognize such a conflict taints the process. He should articulate, or at least examine, whether, in order to preserve fundamental fairness in the process, he should remand to the Council for further consideration.

In the context of the IFQ plan, the Secretary promulgated regulations which were tainted in the extreme by the self-interest of the very Council members who

recommended the regulations. Such an obvious conflict of interest constitutes a procedural irregularity at the Council level. The Secretary's ignoring of this procedural irregularity renders the Secretary's decision to promulgate the regulations arbitrary and capricious. This Court has recognized that "[i]n order for a court to overturn a Secretary's decision, it must be shown that alleged irregularities . . . affected such decision." Alaska Factory Trawlers Association, et. al. v. Malcolm Baldridge, 831 F.2d 1456, 1460 (9th Cir. 1987). Clearly, the six out of seven Council members who had a serious economic stake in the plan voting for the plan (and four out of five members with no economic interest voting against the plan), there is a good reason to believe the irregularities affected the Council's vote which, in turn, affected the Secretary's decision.

Given that "the Court, in passing on the validity of the regulations, must review the plan to the extent necessary to determine whether the Secretary abused her discretion in making her finding", Washington Trollers Association v. Kreps, 466 F.Supp. 309, 312 (W.D. Wash., 1979), it is only appropriate that this Court consider this conflict of interest.

APPENDIX 10 - Petition for Rehearing and Suggestion of Rehearing En Banc at 13-15, dated July 8, 1996.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 95-35077

ALLIANCE AGAINST IFQS; et al.;
Plaintiffs - Appellants;

v.

RONALD H. BROWN; Secretary of Commerce, et. al.;
Defendants - Appellees;
and
PETER M. KNUTSEN; et. al.;
Defendant - Intervenors - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ALASKA
THE HONORABLE JAMES K. SINGLETON, JR., JUDGE

PETITION FOR REHEARING AND SUGGESTION OF
APPROPRIATENESS OF REHEARING EN BANC

III. The Ninth Circuit should apply a "less deferential" standard of review.

As described above, the Secretary ignored a host of deadlines imposed by the statute. *See infra* at 4-5. National Marine Fisheries Service has described statutory limits as imposing a "rigid schedule." The Secretary has no discretion to alter or ignore these time limits. The Secretary's action invalidates the rule.

Furthermore, the Ninth Circuit has recognized and applied a standard "less deferential" than the "reasonableness" standard, where those with discretion to implement a program operated under a conflict of interest and benefited directly from their own actions. *Atwood v. Newmont Gold Co.*, 45 F.3d 1317, 1322 (9th Cir. 1995). This heightened standard of review is appropriate where the decision would affect the individual decision maker financially. *Id.*, citing *Fielding v. International Harvesters*, 755 F.2d 708 (9th Cir. 1985). Here, Council members who would benefit directly, developed the program and the implementing regulations. *See* p. 4, *infra*.

With regard to the IFQ program, not only a conflict of interest justifies heightened scrutiny. The Magnuson Act precludes the Secretary of Commerce from designing or modifying any limited access plans submitted by a council for review. If the court's review is limited as well, there is, in effect, no review of limited access plans. No one protects fishermen from self-dialing.

The Panel struggled in this "troubling case," to uphold a plan which, in the Panel's own words,

> will undoubtedly have an adverse impact on the lives of many fishermen who have done nothing wrong. Their entire legitimate interest in making a living from the fishery has been sacrificed to an administrative judgment about conservation[1] of fish and efficiency of the industry. That is, however, an avoidable consequence of the statutory scheme. Despite the harshness to the fishermen who were left out, there is no way we can conclude on the record that the Secretary lacked a rational basis for leaving them out.

Alliance, ___ F.2d at ___, slip op. at 6115 (footnote added).

If the court had not deferred to the Secretary's judgment, but, instead, had applied a less deferential standard, the Court would likely have done what the Magnuson act required: it would have invalidated the present plan and sent it back to the Council and Secretary to develope one that was fair and equitable to all fishermen.

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1 The Alliance notes that conservation of the fisheries was not a consideration relied upon by the Council or the Secretary in developing or reviewing the IFQ program. In fact, neither the halibut nor sablefish fisheries were threatened before the program began. Furthermore, the IFQ program continues an "attack" fishery, and the same number of fish are caught as were caught under the previous, race-for-fish program. The goal of the IFQ program was to limit investment -- thus, the plan was all about money, not conservation.

APPENDIX 11 - 16 U.S.C. 1855(f)(1).

(f) JUDICIAL REVIEW.--

(1) Regulations promulgated by the Secretary under this Act and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of title 5, United States Code, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable, and

(A) section 705 of such title is not applicable, and

(B) the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such title.

APPENDIX 12 - Plaintiff Alliance Against IFQs' Consolidated Reply To Defendants' And Intervenors' Oppositions To Plaintiffs' Motion For Summary Judgment And Plaintiffs' Opposition To Defendants' And Intervenors' Cross-Motions For Summary Judgment at 6-7, dated August 26, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALLIANCE AGAINST IFQS, et al. Plaintiffs,	)
v.	) No. A93-480 CV (JKS)
RONALD H. BROWN, Secretary of Commerce, et al., Defendants.	) PLAINTIFF ALLIANCE AGAINST IFQS' CONSOLIDATED REPLY TO DEFENDANTS' AND INTERVENORS' OPPOSITIONS TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' OPPOSITION TO DEFENDANTS' AND INTERVENORS' CROSS-MOTIONS FOR SUMMARY JUDGMENT

While plaintiffs do not suggest unprincipled behavior by the decision-makers here, the record does support a picture of compromises of Rube Goldberg complexity among contending groups, the result of which is a rule which fails to achieve any of its significant goals.

APPENDIX 13 - 16 U.S.C. 1852(j)(6).

(j) DISCLOSURE OF FINANCIAL INTEREST AND RECUSAL.--...

(6) The participation by an affected individual referred to in paragraph (1)(A)(ii) in an action by a Council during any time in which that individual is not in compliance with the regulations prescribed under paragraph (5) may not be treated as cause for the invalidation of that action.

APPENDIX 14 - 50 C.F.R. 602.14(c)(3)(i)(A).

§602.14 National Standard 4--Allocations.

. . .

(c) *Allocation of fishing privileges....*

(3) *Factors in making allocations...*

(i) *Fairness and equity.* (A) An allocation of fishing privileges should be rationally connected with the achievement of OY or with the furtherance of a legitimate FMP objective. Inherent in an allocation is the advantaging of one group to the detriment of another. The motive for making a particular allocation should be justified in terms of the objectives of the FMP; otherwise, the disadvantaged user groups or individuals would suffer without cause. For instance, an FMP objective to preserve the economic status quo cannot be achieved by excluding a group of longtime participants in the fishery. On the other hand, there is a rational connection between an objective of harvesting shrimp at their maximum size and closing a nursery area to trawling.

APPENDIX 15 - 50 C.F.R. 602.14(c)(3)(i)(B).

§602.14 National Standard 4--Allocations.

. . .

(c) *Allocation of fishing privileges....*

(3) *Factors in making allocations...*

(i) *Fairness and equity....*

(B) An allocation of fishing privileges may impose a hardship on one group if it is outweighed by the total benefits received by another group or groups. An allocation need not preserve the status quo in the fishery to qualify as *fair and equitable*, if a restructuring of fishing privileges would maximize overall benefits. The Council should make an initial estimate of the relative benefits and hardships imposed by the allocation, and compare its consequences with those of alternative allocation schemes, including the status quo. Where relevant, judicial guidance and government policy concerning the rights of treaty Indians and aboriginal Americans must be considered in determining whether an allocation is fair and equitable.

APPENDIX 16 - 57 Fed. Reg. 57139 (Dec. 3, 1992).

3. Catcher vessel IFQ may be used on a freezer vessel, providing no frozen or otherwise processed fish products are on board at any time during a fishing trip on which catcher vessel IFQ is being used. This provision is intended to enhance opportunities for IFQ crew members. The Council assumed that most IFQ crew members who enter the fishery by purchasing QS would purchase catcher vessel QS because those QSs would be in greater supply and potentially less expensive than freezer vessel QS. However, the Council did not want to enhance opportunities to process fish of any species offshore and thereby deprive shore-based plants the opportunity to process those fish. Therefore, when catcher vessel QS is used on board a freezer vessel, all fish of any species would have to be landed as unprocessed product. Processing of IFQ species harvested with catcher vessel QS would not be allowed on board the vessel using those QSs. The reverse situation, using freezer vessel IFQ on a catcher vessel, would not be allowed. Moreover, a catcher vessel would not be allowed to land any IFQ species as frozen or otherwise processed product.

. . . .

APPENDIX 17 - Brief of Points and Authorities in Support of Alliance Against IFQs' Motion for Summary Judgment at 65-67, dated June 17, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALLIANCE AGAINST IFQS, et al. Plaintiffs,	)
v.	) No. A93-480 CV (JKS)
RONALD H. BROWN, Secretary of Commerce, et al.,	) BRIEF OF THE POINTS) AND AUTHORITIES IN) SUPPORT OF THE
Defendants.	) ALLIANCE AGAINST) IFQS' MOTION FOR) SUMMARY JUDGMENT

The regulations provide that initial allocation of QS will be given only to vessel owners and lease holders whose vessels landed sablefish or halibut during the qualifying years of 1988-1990. Thus a person who fished for sablefish or halibut every single year as a crew member or skipper would be completely excluded from receiving any of the fruits of his labor in the form of QS allocation. A person who merely owned his vessel, however, which was used entirely by a hired skipper and crew members, would receive credit for the fish caught by the skipper and crew in the form of QS for all the landings of that vessel, even though crew have traditionally been entitled to a percentage of the fish caught as compensation for their effort. The person who invested capital is thus rewarded by receipt of a piece of the fishery; the person who investor labor receives nothing.

The Council and NMFS justified this decision on the basis of a distinction between capital and labor, with no explanation of how such a distinction relates to the factors of present participation in the fishery and historical fishing practices and dependence on the fishery. In response to comments in the preamble to the final rule, NMFS defended its decision by stating that the Council chose vessel ownership or lease as a criterion because of the financial risk that such persons assume and the fact that these are the persons who decide whether to enter or exit a fishery and so affect the amount of capital in a fishery. AR 1a-26, page 59,3485.[13] Presumably, this was important to the Council

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13 The rationale of "financial risk" is severely diluted for lease holders whose temporary lease does not constitute a capital investment and who receive a percentage of the catch, much like a crew member.

because overcapitalization of the fishery had been identified as the primary source of other problems. By allocating QS only to vessel owners, it was hoped that less efficient vessel owners would sell QS to more efficient vessel owners and fishermen, thereby "rationalizing" the fishery in economic terms and reducing the size of the fleet. As discussed in the FEIS, however, this result is unlikely to occur because of the social engineering measures in the plan. AR 4-43, pages 2-52 and 2-53. The rationale, then, for awarding QS only to vessel owners and leaseholders is flawed at the outset and provides no basis for excluding crew members and hired skippers, whose historical dependence on the fishery is at least as great as that of vessel owners.

APPENDIX 18 - Final Environmental Impact Statement/Environmental Impact Statement for the Individual Fishing Quota Management Alternative for Fixed Gear Sablefish and Halibut Fisheries, Gulf of Alaska and Bering Sea/Aleutian Islands, September 15, 1992 at 2-23.

2.3.3 The initial distribution of quota shares

The amount of the initial halibut (sablefish) quota shares for an area assigned to each person will equal the halibut (sablefish) landings for the person's best five years of 1984 through 1990 (1985 and 1990) for that area. The historical landings of a vessel will be counted as the lease holder's if there is one; otherwise, they will be counted as the vessel owner's. This will be done on a trip by trip basis. The initial assignment of quotas shares to each person by vessel class will be based on the vessel class used in the most recent year through September 25, 1991. Specifically, if a vessel is determined to be in a specific class and that vessel was used in the most recent year of participation by the owner or lease holder, then all qualifying pounds credited to that person during the qualifying years shall be assigned to that vessel class. However, if the owner or lease holder participated in the most recent year using vessels in more than one vessel class, qualifying pounds will be assigned to separate vessel classes in proportion to the landings made with each vessel class.

The beginning year of each of these catch history periods was selected to assure that the initial distribution of QSs reflected the long-standing participation and dependence on

the fisheries. Many of those with five or more years of landings would have received IFQs in 1991 that were at least 80% of their average annual landings.

There are two reasons why the end of the qualifying periods is 1990. First, extending it beyond that would have provided an incentive both for additional fishermen to enter the fishery and for previous entrants to adopt extreme fishing methods in order to increase their landings and, therefore, the QSs they would receive if an IFQ program is implemented. This speculative activity would have intensified the race for fish and imposed substantial costs on the fishery in 1991. Second, it would have made it more difficult for a person to calculate what his QS and IFQ would be by area for each of the alternatives being considered.

FILED
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No. 96-1128

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALLIANCE AGAINST IFQS, ET AL., PETITIONERS

v.

WILLIAM M. DALY, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, by reviewing the Secretary's adoption of fishery management regulations under an "arbitrary and capricious" standard, the court of appeals violated the Due Process Clause of the Fifth Amendment.

2. Whether the Secretary's regulations comport with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, and with the Northern Pacific Halibut Act of 1982, 16 U.S.C. 773 *et seq.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 84 F.3d 343. The opinion of the district court (Pet. App. 36a-54a) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 22, 1996. A petition for rehearing was denied on August 15, 1996. Pet. App. 55a-56a. The petition for a writ of certiorari was filed on November 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. 1801 *et seq.*, to protect the nation's fisheries from overfishing, which threatens the nation's food supply, health, and economy. 16 U.S.C. 1801(a)(1). The Magnuson Act authorizes the creation and enforcement of fishery management plans "to prevent overfishing, and to protect, restore, and promote the long-term health and stability of the fishery." 16 U.S.C. 1853(a)(1)(A). The plans must be consistent with seven national standards for fishery conservation and management. 16 U.S.C. 1851(a)(1)-(7). The Magnuson Act established eight regional fishery management councils, 16 U.S.C. 1852(a), which advise the Secretary of Commerce in the "preparation, monitoring, and revision" of fishery management plans. 16 U.S.C. 1801(b)(5).[1] The regional councils are accorded discretion in developing the fishery management plans. The plans may require fishing vessels to obtain permits, restrict certain types of fishing gear, establish catch limits, and limit access to a fishery. See 16 U.S.C. 1853(b). If a council chooses to limit access to a fishery, both the Secretary and the council must "take into account" six enumerated factors, including "present participation" in the fishery and historical fishing practices. 16 U.S.C. 1853(b)(6).[2]

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[1] The relevant regional council in this case is the North Pacific Fishery Management Council, which governs fishing in and around Alaska.

[2] Subsequent to the adoption of the fishery management plan at issue here, Congress placed a moratorium until October 1, 2000, on the adoption of any new programs that limit fishery

Once a regional council develops a plan, it is submitted, along with proposed implementing regulations, to the Secretary for review. 16 U.S.C. 1853(c). If the Secretary approves the plan, he also promulgates the necessary implementing regulations. 16 U.S.C. 1855(a). If the Secretary finds that the plan warrants further review, the Secretary must immediately initiate such review and publish a notice in the Federal Register soliciting written data, views, and comments on the plan. 16 U.S.C. 1854(a)(1)(B) and (C). The Secretary must "take into account" any data, views or comments received. 16 U.S.C. 1854(a)(2)(A).

b. The Northern Pacific Halibut Act of 1982 (Halibut Act), 16 U.S.C. 773 *et seq.*, authorizes the regional fishery management councils established under the Magnuson Act to develop regulations, including limited access regulations, governing halibut fishing in United States waters. 16 U.S.C. 773c(c). Regulations proposed by the regional councils may be implemented only with the approval of the Secretary following notice and comment rulemaking. *Ibid.*[3]

2. The 1980s witnessed a marked increase in sablefish and halibut fishing in Alaskan waters. See 58 Fed. Reg. 59,375, 59,376 (1993). The vigorous competition between commercial fishers resulted in numerous problems, such as excessive gear investment, waste of fish resources due to lost gear and extremely

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access by imposing individual fishing quotas. Sustainable Fisheries Act, Pub. L. No. 104-297, § 108(e), 110 Stat. 3576-3577.

[3] The fishery for halibut in and off Alaska is also governed by regulations (50 C.F.R. Pt. 301) of the International Pacific Halibut Commission, developed pursuant to the 1953 Convention between the United States and Canada for the Preservation of Halibut Fishery of Northern Pacific Ocean and Bering Sea, as amended, Mar. 29, 1979, 32 U.S.T. 2483.

limited legal fishing seasons, and a consequent fluctuating supply of fresh fish for market. See Pet. App. 3a-4a.

In October 1992, the regional council submitted a fishery management plan to the Secretary for regulating sablefish and halibut fishing. The council proposed allocating individual fishing quotas (IFQs) among all owners and lessees of fishing vessels that legally fished for halibut and sablefish between 1988 and 1990. Pet. App. 5a; 58 Fed. Reg. 59,406 (1993) (codified at 50 C.F.R. 676.20(a)(1)).[4] The size of each individual's quota share would depend upon the volume of halibut and sablefish landed during specified years. Pet. App. 5a.[5] Qualified fishers not originally allocated a quota share under the plan could purchase a quota share from a holder of such a share.

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[4] IFQs are defined as "the annual catch limit of sablefish or halibut that may be harvested by a person who is lawfully allocated a harvest privilege [or quota share] for a specific portion of the total allowable catch of sablefish or halibut." 58 Fed. Reg. 59,403 (1993) (codified at 50 C.F.R. 676.11)). The annual allocation of IFQ to any person will be calculated by multiplying the total allowable catch of sablefish or halibut designated for an area by the ratio of that person's quota share to the total quota share available for that area. 58 Fed. Reg. at 59,407 (codified at 50 C.F.R. 676.20(f)(1)). In general, a person's total quota share represents that person's "share" of the fishery in an area, from which the person's individual annual catch limit (or IFQ) of sablefish and halibut, expressed in pounds, is calculated. Subject to limited exceptions, no person may retain an amount of sablefish or halibut harvested in excess of his or her IFQ. 58 Fed. Reg. at 59,405 (codified at 50 C.F.R. 676.16(d)).

[5] For sablefish, the base period is 1985-1990. For halibut, the base period is 1984-1990. 58 Fed. Reg. 59,406 (1993) (codified at 50 C.F.R. 676.20(b)).

In December 1992, the Secretary published a proposed rule implementing the council's IFQ program, and solicited public comment. 57 Fed. Reg. 57,130 (1992). In November 1993, the Secretary published a final rule approving the IFQ plan for sablefish and halibut and adopting implementing regulations. 58 Fed. Reg. 59,375 (1993).

3. Petitioners, the Alliance against IFQs and a number of individuals who were not assigned IFQs under the plan, filed suit challenging as arbitrary and capricious the Secretary's adoption of regulations implementing the plan. The district court granted the Secretary's motion for summary judgment and dismissed the case. Pet. App. 36a-54a. The court of appeals affirmed. *Id.* at 1a-33a. The court ruled that the decision to limit the allocation of IFQs to vessel owners and lease holders was reasonable both because of the need to curb excess capital investment in fishing and because of the practical difficulties in calculating and enforcing individual crew member shares. *Id.* at 21a-22a. The court of appeals also ruled that adopting 1990 as a cut-off date for measuring quota shares was reasonable to prevent excessive fishing efforts (aimed at boosting the final quota shares) during the time the plan was under consideration. *Id.* at 8a-11a.[6]

ARGUMENT

1. Petitioners contend (Pet. 9-12) that the court of appeals' review of the regulations under the arbitrary and capricious standard, rather than a stricter standard of review, denied them procedural due process

[6] The court of appeals rejected a number of other challenges to the regulations, none of which petitioners raise in their petition for certiorari.

because some of the members of the regional council have interests implicated by the fishery management plan. Petitioners, however, did not raise this constitutional argument below. Nor did either the district court or court of appeals address the question. Indeed, petitioners acknowledged below that the regulations were to be reviewed under the arbitrary and capricious standard, as required by the Magnuson Act, 16 U.S.C. 1855(f)(1), and case precedent. See Pet. App. 319a-320a; Knutsen Br. in Opp. App. 10a-12a. Ordinarily, "[i]t is this Court's practice to decline to review those issues neither pressed nor passed upon below." *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990) (plurality opinion); see also *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992).[7]

Review of this question would be inappropriate in any event. Application of the arbitrary and capricious standard of review in this context, as the statute prescribes, does not conflict with the decision of any other court of appeals. See *C & W Fish Co.* v. *Fox*, 931 F.2d 1556, 1562 (D.C. Cir. 1991) (citing additional cases).

Furthermore, petitioners' claim of unconstitutional bias is misplaced. The final decision under review is the decision of the Secretary, and petitioners make no argument that the Secretary suffered from any improper bias or conflict of interest. The court of appeals' deference to the Secretary's regulations thus in no sense deprived petitioners of an impartial deci-

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[7] Petitioners did ask the court of appeals to apply a fiduciary standard of review (Pet. App. 7a), but they did not claim that failure to do so would be unconstitutional. Also contrary to their position here, petitioners specified in the district court that they were not "suggest[ing] unprincipled behavior by the decision-makers." Knutsen Br. in Opp. App. 31a.

sionmaker. Cf. *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975) (discussing constitutional protection against a "biased decisionmaker").

That the Secretary was advised by persons, some of whom allegedly had affected interests, raises no issue of constitutional dimension. Quite the opposite, Congress expressly mandated in the Magnuson Act that the regional councils advising the Secretary consist of persons "who, by reason of their occupational or other experience * * * are knowledgeable regarding the conservation and management, or the commercial or recreational harvest, of the fishery resources of the geographical area concerned." 16 U.S.C. 1852(b)(2)(A). Because the underlying proceeding involved general rulemaking, rather than an individualized administrative adjudication, the notice-and-comment rulemaking process and the availability of judicial review under the Administrative Procedure Act provided petitioners all the process they were due. Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 538-549 (1978). Further review is therefore not warranted.

2. a. Petitioners argue (Pet. 13-19) that, in distributing the initial quota shares to vessel owners and lessees, while omitting crewmembers who had no financial investment in the vessel on which they served, the Secretary failed to allocate shares in a fashion that is "fair and equitable to all such fishermen," as required by both the Magnuson Act, 16 U.S.C. 1851(a)(4)(A), and the Halibut Act, 16 U.S.C. 773c(c).

As the court of appeals recognized, the requirement of a fair and equitable allocation is only one of seven distinct factors the Secretary must weigh in adopting

a fishery management plan that accomplishes the goals of conservation and the efficient and productive use of environmental resources. Pet. App. 17a-20a. Because "[t]here is a necessary tension, perhaps inconsistency, among these objectives," no single factor can dictate a plan's content. *Id.* at 19a. Rather, the Secretary must balance the competing concerns and "each goal [may] be sacrificed to some extent to meeting the others." *Id.* at 20a. Because the Secretary considered the investment of "excess capital" into fishing boats and equipment to be one of the primary causes of overfishing, it was reasonable to limit the issuance of IFQs to vessel owners and lease holders, who are "the most directly involved persons in terms of capital investment." 58 Fed. Reg. 59,380 (1993); see also Pet. App. 21a-22a. Furthermore, the allocation of quota shares by vessel, rather than to individual fishermen, is more feasible to monitor and enforce. *Id.* at 21a (noting "the practical difficulties of documenting crew shares") (quoting 58 Fed. Reg. 59,386 (1993)).

b. The court of appeals also correctly rejected petitioners' argument (Pet. 19-22) that the Secretary failed to consider the fishermen's "present participation" in the fishery when allocating the IFQs. When adopting a plan that limits access to a fishery, the Secretary is required by both the Magnuson Act and the Halibut Act to "take into account" six factors, including "present participation in the fishery." 16 U.S.C. 1853(b)(6); 16 U.S.C. 773c(c).[8] The Secretary

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[8] For purposes of Section 1853(b)(6), "take into account" means that the factors are to be "considered." H.R. Rep. No. 445, 94th Cong., 1st Sess. 66 (1975); see also 50 C.F.R. 602.15(c)(2).

chose 1990 as the cut-off date for demonstrating "present participation" in the fishery and, thus, an entitlement to an IFQ.

Petitioners concede that some cut-off date is necessary (Pet. 21), but argue that the year 1990 did not reflect "present" participation by the time the Secretary's final rule was adopted in 1993. The Secretary, however, chose the 1990 cut-off because basing quota share allocations on prospective participation in 1992 and 1993, while the fishery management plan was under active consideration, would have promoted entry into the fisheries by new participants and encouraged all participants to intensify the already excessive race for fish to maximize their potential quota shares. 58 Fed. Reg. 59,386 (1993); see also 58 Fed. Reg. at 59,380. Thus, as the court of appeals recognized, the cut-off date reflected a desire not "to exacerbate overcapacity in the fishery by allowing speculative fishing in that year and subsequent years to qualify for an initial allocation of [quota share]." Pet. App. 12a.[9]

Finally, because the court of appeals' decision is in accord with the decisions of other courts of appeals, see *C & W Fish*, 931 F.2d at 1563-1564, and because the questions of how quota shares should be allocated and what cut-off date should be selected are narrow inquiries that present no issue of broad importance, further review is not warranted.

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[9] Petitioners correctly note that the Secretary's action exceeded the timeframes established by the Magnuson Act. Petitioners do not contend, however, that this delay deprived the Secretary of power to adopt this IFQ plan. See Pet. App. 13a; see also *Brock* v. *Pierce County*, 476 U.S. 253, 259-262 (1986).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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